TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 52

W. T. WAGGONER ESTATE AND W. T. WAGGONER, APPELLANTS,

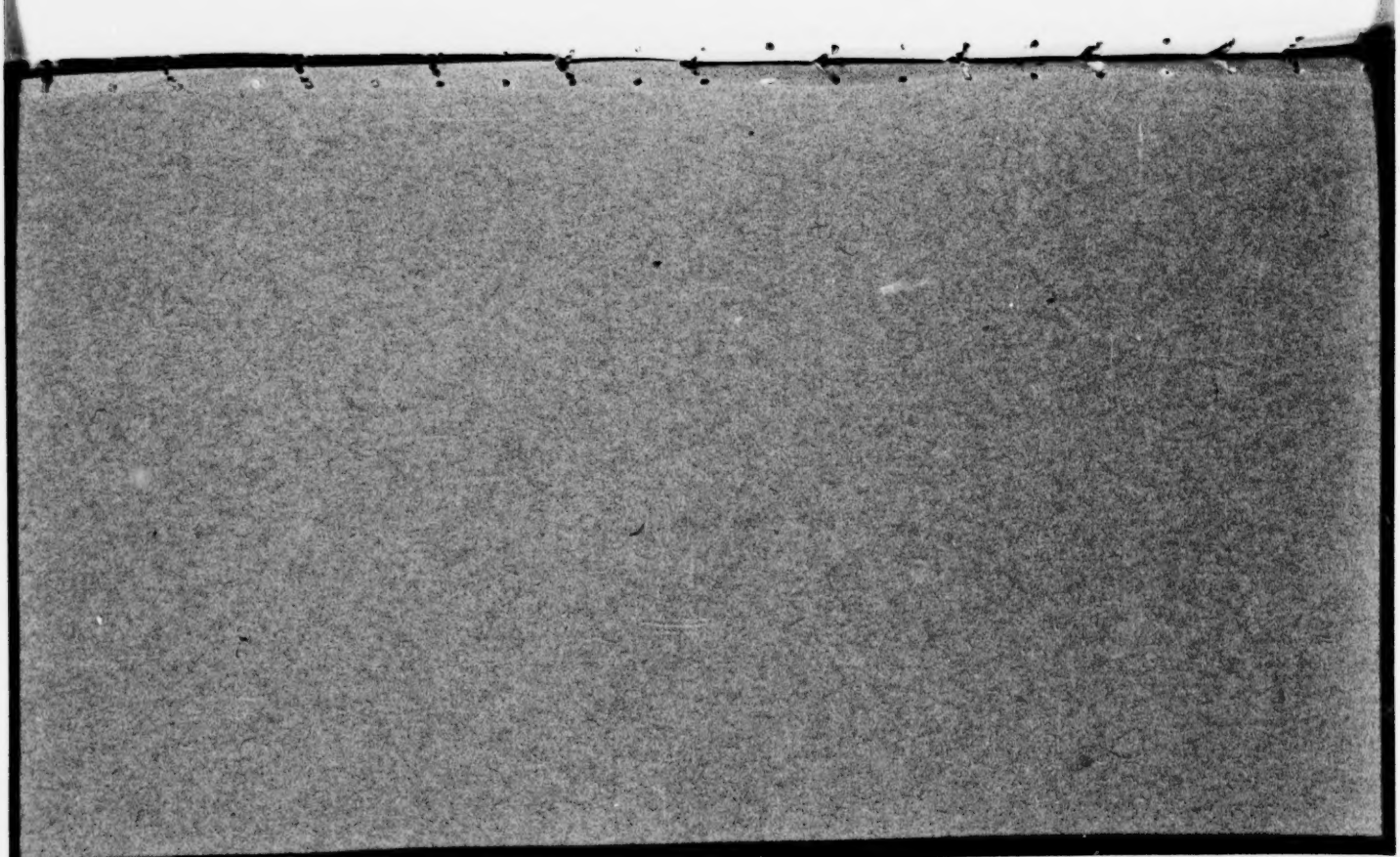
vs.

WICHITA COUNTY AND D. B. SARTIN, H. H. HAYNES, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MARCH 31, 1926

(30,966)



(30,983)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 332

W. T. WAGGONER ESTATE AND W. T. WAGGONER, APPELLANTS,

vs.

WICHITA COUNTY AND D. B. SARTIN, H. H. HAYNES, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Proceedings in United States circuit court of appeals, for fifth circuit...	a
Caption.....(omitted in printing)..	a
Record from the district court of the United States, northern district of Texas	1
Caption	1
Bill of complaint	1
Amended bill of complaint	21
Exhibit A—Lease, W. T. Waggoner to Texhoma Oil & Refining Co., February 10, 1922	30
B—Lease, W. T. Waggoner to James A. Moore, June 14, 1922	33
C—Lease, W. T. Waggoner to T. G. Lomax, November 22, 1922	37
D—Lease, W. T. Waggoner to Humble Oil & Refining Co., May 11, 1922	40
E—Lease, W. T. Waggoner to Charles F. Spencer, November 1, 1921	44
Motion to dismiss	49
Answer	52
Defendants' reply to amended bill of complaint	69
Final decree	77
Statement of evidence	79
Testimony of Irvan Deaton	79
Exhibit 1—Inventory of property rendered for tax assessment for 1923	93
2—Certified inventory of property rendered for tax assessment for 1922	97

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1925

	Page
Exhibit 3—Certified inventory of property rendered for tax assessment for 1921	99
4—Certified inventory of property rendered for tax assessment for 1920	102
6—Certified inventory of property rendered for tax assessment for 1919	104
Plaintiffs' Exhibit 3—Form B in blank	111
Statement re exhibits	116
Exhibit No. 17—Letter from R. L. More to Mrs. P. M. Kebort, June 7, 1922	125
Exhibit No. 18—Letter from W. T. Waggoner to C. F. Kolp, May 12, 1922	125
Statement re exhibits	126
Plaintiffs' Exhibit No. 25—Lease, W. T. Waggoner to Texas Co.	135
Argument of counsel	141
Plaintiffs' Exhibit No. 28—Deed of land, W. T. Waggoner and wife to W. T. Waggoner estate	144
Plaintiffs' Exhibit No. 29—Deed of personal property, W. T. Waggoner and wife to W. T. Waggoner estate	146
Testimony of J. C. Gwynne	150
R. L. More	158
L. H. Cullum	168
W. D. Hamilton	174
D. O. Johnson	179
C. O. Walling	181
B. E. Sartan	183
Irvan Deaton	189
R. M. More (recalled)	195
Exhibit No. 30—List of wells producing in 1923	196
Stipulation re transcript of evidence	202
Judge's certificate to statement of evidence	202
Petition for appeal	203
Order allowing appeal	204
Motion and order extending time	204
Assignment of errors	207
Petition for appeal and supersedeas and order allowing same	225
Bond on appeal	227
Præcipe for transcript of record	229
Stipulation re transcript of record	231
Clerk's certificate	233
Argument and submission	234
Opinion, Walker, J	234
Judgment	237
Petition for appeal	238
Order allowing appeal	238
Stipulation re amount in controversy	239
Assignments of error	239
Bond on appeal (omitted in printing)	243
Stipulation re transcript of record	243
Waiver of service of appeal papers	243
Clerk's certificate	243

[Caption omitted]

CAPTION.

BE IT REMEMBERED, that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Wichita Falls, Texas, on March 24, 1924, and which term was adjourned on the 12th day of April, 1924, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

No. 152 In Equity.

W. T. WAGGONER, ET AL.,
Plaintiffs,

versus

WICHITA COUNTY, TEXAS, ET AL.,
Defendants.

---

2 BILL OF COMPLAINT.

Filed Feb. 1, 1924.

To the Honorable Judges of the District Court of the United States for the Northern District of Texas:

W. T. Waggoner and the W. T. Waggoner Estate, plaintiffs, bring this their bill of complaint against D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth, Guy C. Raley and Wichita County, defendants, and with respect show:

I.

Plaintiff, W. T. Waggoner is a citizen of and resident of Tarrant County, Texas. Plaintiff, W. T. Waggoner Estate, is a trust estate, a voluntary association of persons duly formed and created by articles of written agreement, of which W. T. Waggoner is Trustee, said Trust Estate having full and complete power and authority, by the articles of agreement creating it, to own, hold and possess the property hereinafter described, with the right to sue with respect to said property or any other right of said Trust Estate, and subject to be sued for any of the property hereinafter described, or for the enforcement of any obligation of any kind with reference thereto, or lien thereon, or for any other matter in any way connected with its ownership of said property. The W. T. Waggoner Estate for convenience herein is called the "Trustee Estate," which has its legal domicile in the State of Texas.

Defendants, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley are citizens and residents of Wichita County, Texas, which is in the Northern District of Texas and in the Wichita Falls Division of that District. The individual defendants herein named now hold the following offices, respectively, in Wichita County, Texas, and so held them at all material times herein stated:

D. B. Sartin is County Judge; H. H. Haynes, J. B. Jackson, L. L. Kuntz and F. R. Knauth are County Commissioners of said County, and Guy C. Raley is County Tax Collector of said County. Said County Judge and said four County Commissioners, by the laws of Texas, constitute the Commissioners Court of Wichita County and the Board of Equalization, for the equalizing of the

taxes of said county for the year 1923. Guy C. Raley is the duly authorized Tax Collector of said County having authority, by the laws of Texas, to collect the taxes assessed and claimed against these plaintiffs,
3 as hereafter set out.

Wichita County is a public municipal corporation, being one of the political subdivisions of the state of Texas known as a county, and was such at all material times herein stated, and as such that defendant is capable of suing and is subject and liable to be sued on the causes of action herein set forth.

II.

The amount in controversy herein, exclusive of interest and costs, as will hereafter more fully appear by the allegations hereof, exceeds the sum or value of Ten Thousand ($10,000.00) Dollars; that this suit is for the enforcement of rights of plaintiffs and for their protection as citizens of the United States and of the State of Texas, wherein they reside, as those rights are given them and protection afforded them by Section 1 of the Fourteenth Amendment to the Constitution of the United States providing in effect that no state shall deprive any person of his property without due process of law, nor deny to him within the jurisdiction of the United States the equal protection of the laws; that this suit is, hence, of a civil nature in equity, and arises under the Constitution of the United States, as will fully hereafter appear.

III.

On January 1, 1923, and long prior thereto, and until, to-wit, March 31, 1923, plaintiff, W. T. Waggoner, was

the owner of and in possession of sundry and divers tracts and surveys of land in Wichita County, Texas, being approximately Twelve Thousand (12,000) acres, the said lands being thus described, to-wit:

Abstract Number		Acreage	Name Original Grantee.
13		393	J. Bradley,
553		33	F. J. Cook,
455		1280	A. Gibson,
533		287	S. Holloway
803		38	M. M. McLaurey,
393		647	Seal & Morris,
535		453	Seal & Morris,
531		300	GC&SF Ry. Co.,
731		297	GC&SF Ry. Co.,
530		171	GC&SF Ry. Co.
738		159	GC&SF Ry. Co.
586		488	GC&SF Ry Co.,
606		225	GC&SF Ry. Co.,
137		640	HT&B R. R. Co.,
505		384	HT&B R. R. Co.,
716		76	H&TC Ry. Co.,
110		300	H&TC Ry. Co.,
771		640	H&TC Ry. Co.,
109		646	H&TC Ry. Co.,
761		476	H&TC Ry. Co.,
	790	9	H&TC Ry. Co.,
4	788	40	H&TC Ry. Co.,
	106	611	H&TC Ry. Co.,
108		618	H&TC Ry. Co.,
482		640	H&TC Ry. Co.,
105		650	H&TC Ry. Co.,
392		354	H&TC Ry. Co.,

800	250	H&TC Ry. Co.,
688	8	H&TC Ry. Co.,
122	95	H&TC Ry. Co.,
784	640	H&TC Ry. Co.,
569	141	Texas Central Ry. Co.,
632	68	Texas Central Ry. Co.

On the above described lands there were, on January 1, 1923, producing oil wells that were then producing oil in such quantities that one-eighth (1/8) thereof when produced was equal to, on that date, seven hundred twenty-three (723) barrels.

Said plaintiff, W. T. Waggoner, on said January 1, 1923, also owned and had in his possession in Wichita County, Texas, twelve (12) head of milch cattle of the value of $300.00; six (6) head of horses of the value of $300.00; two wagons and two automobiles of the value of $2000.00; and certain farm implements and tools of the value of $2000.00. He had on hand and in his possession in Wichita County on said date certain crude oil not exceeding three thousand (3000) barrels, of the value of $1.80 per barrel, and neither said plaintiff, W. T. Waggoner, nor his co-plaintiff herein the said Trust Estate, had any land or personal property in Wichita County on said date other than that hereinbefore described.

IV.

Plaintiffs aver that by contract and agreement plaintiffs, W. T. Waggoner and said Trust Estate, the said Trust Estate was to become and did become the owner and possessor of said lands and said personal property (except the said crude oil so on hand) on and as of date

March 31, 1923, conveyances and other instruments of transfer in due form having been executed by plaintiff, W. T. Waggoner, to plaintiff, Trust Estate, on, to-wit, June 13, 1923, by which said conveyances and instruments of transfer said W. T. Waggoner warranted the title to all of said property as being then free and clear of all liens and encumbrances of any and every kind whatsoever.

V.

Plaintiffs further aver that heretofore, between January 1, 1923, and May 1st of said year, and within the time prescribed by the statutes of Texas for so doing, said plaintiffs, acting through their agent, R. L. More, rendered and listed the said lands aforesaid and the said personal property aforesaid (except the said crude oil on hand, which by oversight was not listed), to Irvan Deaton, Tax Assessor of Wichita County, Texas, for taxation purposes for the year 1923, fixing specific values on said lands in said rendition, and fixing values of said personal property, as aforesaid, at the figures as hereinbefore shown, except as to the said crude oil so on hand, which by oversight was neither rendered, listed nor valued, as aforesaid.

Plaintiffs aver that in seasonable time, as determined by the laws of Texas relating to taxation, the tax rolls of Wichita County were made up, and based on the rendition so made, plaintiffs' property as aforesaid, was listed on said tax rolls, save and except the said crude oil as aforesaid, and thereafter and within the time prescribed and fixed by said laws of Texas, said tax rolls were transmitted and delivered to the Honorable Commissioners Court of Wichita County, Texas, sitting

as a Board of Equalization, accordingly as that Board is created and denominated by the statutes of Texas relating to taxation of property.

Said Commissioners Court while in session and acting as such and as a Board of Equalization, and within the time contemplated and required by law, inspected and reviewed the said tax rolls of Wichita County, and the properties of plaintiffs appearing thereon, whereupon they raised the assessment so made by plaintiffs, as aforesaid, raising the value of the lands, and listing and assessing against the plaintiff, W. T. Waggoner, personal property in the aggregate sum of Seven Hundred Twenty-eight Thousand Three Hundred ($728,300.00) Dollars valuation. Said Court, so acting as aforesaid, gave due notice of its said intention to so raise said property and its action with respect thereto, to the agent of said plaintiffs, whereupon and in response thereto said agent, at a later time fixed by said Court, appeared before said Court so sitting as a Board of Equalization and presented facts and proof showing and tending to show that plaintiffs should not be assessed with personal property of a valuation of $728,300.00; but, notwithstanding said showing and protest of plaintiffs' agent, as aforesaid, said Court at said hearing, contrary to law, contrary to the facts and wholly without evidence to sustain its action, and arbitrarily ignoring the applicable law and facts to plaintiffs' assessment as to personal property, intentionally, knowingly and erroneously fixed the valuation of plaintiffs' personal property in Wichita County, Texas, at the sum of $728,300.00. This valuation was wholly arbitrary and in every way discriminatory against the rights of these plaintiffs; it was grossly excessive, entirely erroneous, both as a matter of fact and law, and was an intentional and purposeful assess-

ment of more than $718,300.00 in value of personal property for taxation in Wichita County, Texas, as being personal property owned and held by plaintiffs, which neither of plaintiffs on January 1, 1923, had, held,
6 owned or possessed.

That the said action of said Commissioners Court, as aforesaid, and members thereof, in so fixing the valuation of plaintiffs' personal property at said sum was, for the reasons aforesaid and for the reasons hereafter shown, fraudulent in law, and in the alternative plaintiff avers that if the same was not fraudulent in law because of the facts and reasons aforesaid, as well as for the reasons hereinbefore set forth, then the said valuation to the extent of $718,300 in value of personal property, was the result of mistake and grossly erroneous judgment of said Commissioners Court and the members thereof; because in fact and in truth plaintiffs, nor either of them, held or possessed personal property in Wichita County, Texas, on January 1, 1923, of a value exceeding the sum of Ten Thousand ($10,000) Dollars, which said Commissioners Court and the members thereof well know; or, it was at least true, from undisputed evidence before said Commissioners Court so sitting as a Board of Equalization and under the applicable law of Texas, said plaintiffs, nor either of them, had, owned or possessed personal property in Wichita County, Texas, on January 1, 1923, to an amount of $718,300.00 of the said total item of $728,300.00, so assessed and claimed by said county.

VII

Plaintiffs further aver that the said assessment of personal property to the extent of $718,300.00 against

plaintiffs, as aforesaid, was arbitrary, excessive and discriminatory. Plaintiffs are informed and believe and thereupon charge the fact to be, that said assessment of personal property, as aforesaid, to the extent of said $718,300.00 was fixed, arrived at, determined and found by said Commissioners Court, acting as a Board of Equalization, as aforesaid, on the basis and theory that plaintiffs should be assessed the sum of at least $718,300.00 against, on and as personal property in Wichita County, Texas, because on, in and under plaintiffs' lands it was estimated and considered there were, on January 1, 1923, certain quantities of oil, and certain quantities of oil from said lands were being produced by oil wells located on said lands on January 1, 1923; that because of such wells and the then daily production thereof it was estimated that there would be produced from said oil wells during the year 1923, a certain calculated quantity of crude oil, of which plaintiffs herein, when the same was produced, would receive a one-eighth (1/8) thereof as royalty, and that in said estimate it was considered and found by said Court that the value of said oil so to be produced would be at the rate of One Thousand ($1000.00) Dollars per barrel for each barrel
7 of daily production of said wells, as daily production was determined for and as of January 1, 1923; but in truth and in fact plaintiffs herein aver that as a matter of law they did not have title to any oil in, on or under said lands on January 1, 1923, nor any time subsequent thereto in said year, for this, long prior to January 1, 1923, plaintiff, W. T. Waggoner, had executed oil and gas leases on all of the said lands on which said producing wells were located, by which leases the said plaintiff, W. T. Waggoner, for valuable consideration received by him, and of the royalties to be

paid to him had leased, granted, bargained sold and conveyed to the several lessees in said leases all the oil, gas and other minerals in and under the said tracts of land on which the said producing wells were, together with the exclusive right to the said lessees, respectively, of ingress and egress at all times on said lands for the purpose of prospecting, drilling, mining and otherwise operating thereon, there having been so executed by him prior to January 1, 1923, such leases and conveyances aforesaid, on approximately Twenty-three (23) different tracts of land, which included and covered all the lands on which there were any producing wells on January 1, 1923, said instruments so constituting said leases and conveyances, as aforesaid, of said oil, gas and mineral rights, providing in each case that by agreement said plaintiff, W. T. Waggoner, as lessor and grantor, should receive royalties as to oil a quantity equal to one-eighth of all the oil produced and saved from said lands, the oil so thus going to plaintiff aforesaid as such royalties to be delivered at the wells when produced, or to the credit and for the account of said plaintiff in the pipe lines to which said wells might be connected, whereby the said lessees in said various leases became the owners in all respects, so far as the taxation laws of Texas, were concerned, of all the oil and gas in, on and under said lands, always until the same was produced by the lessees or by someone for or acting under them, and delivered when produced, so far as the royalties were concerned, to the said plaintiff, that thereby the said lessees and their assigns became and were solely liable and responsible for all state, county and school district taxes assessable on account of the presence or existence of said oil in, on and under said lands, and at all times until the same was produced and the

royalty part thereof delivered to the possession and custody of plaintiffs herein; that plaintiffs nor either of them, had or kept on hand any of said oil, save and except plaintiff, W. T. Waggoner, had on hand on January 1, 1923, in said county, not exceeding the said three thousand barrels of crude oil.

That said Commissioners Court and the members thereof were guilty of gross discrimination, manifest and intentional, and wrongful findings, assessing the taxes of plaintiffs on an unequal and inequitable basis, and in assessing plaintiffs taxes unjustly and arbitrarily without reference to the facts, and contrary to the facts and evidence that was presented by plaintiffs' said agent at the hearing of the aforesaid Board, in that the said Commissioners Court and the members thereof, sitting as such Board of Equalization, intentionally, knowingly, arbitrarily and purposely exempted, freed and relieved of taxation, as plaintiffs are informed and believe and thereupon charge the fact to be, large quantities of personal property of lessees of oil leases, or assignees or lessees of oil leases, and other persons standing in the relation of such lessees, or assignees thereof, producing oil in said county, so failing and refusing to tax, but exempting from taxation said personal property of said persons, such as oil well derricks, rod lines, oil well casing in wells and on hand on leases, tubing for pumping, engines, pump jacks on leases, gathering lines, storage tanks, boilers, houses and water lines on leases, the amount in value of such personal property being thus exempted and freed from taxation by the acts and judgment of said Commissioners Court being, as plaintiffs are informed and believe and thereupon charge the fact to be, more than the sum of $500,000.00, whereby the result is by said wrongful

8

acts of said Commissioners Court, as aforesaid, that more than $500,000.00 in value of personal property in Wichita County, on January 1, 1923, such as the foregoing, and in every way subject to taxation and entitled to bear its proportion of taxation in said county and state, is made free, clear and exempt from such taxation;

Plaintiffs further aver that if it be found and determined that the laws of Texas justify and permit the said discrimination as aforesaid, and the equality of taxation, as aforesaid, that then the said laws of Texas are void and non-enforcible, in that, they take and permit the taking of the property of plaintiffs without due process of law and deny to plaintiffs the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and plaintiffs' rights thereunder being invoked herein as a basis of attack against said pretended assessment of taxation on said $718,300.00 valuation.

Plaintiffs further aver that the facts and evidence presented by plaintiffs' said agent at said hearing showed without dispute or contradiction that plaintiffs did not have, on January 1, 1923, in Wichita County, property subject to taxation, save and except to the extent of the aforesaid $10,000.00 in valuation, being the list of cattle, horses, wagons, automobiles, tools and implements of the aggregate value of $4600.00, aforesaid,
9 and the said 3000 barrels of crude oil, as a maximum, as aforesaid, of the value of not exceeding $5400.00, on January 1, 1923.

VIII.

Plaintiffs aver that although the tax values on plaintiffs' said lands, as aforesaid, were raised by said Com-

missioners Court above the values at which said lands were listed by plaintiffs' said agent for taxation, for the year 1923, plaintiffs do not controvert or dispute said values, and said values have been accepted for taxation purposes; that the said lands were so assessed as separate tracts of lands; they were so assessed on the tax rolls of Wichita County, Texas, said separate tracts of lands having ascribed thereto their separate valuations, the said rolls so separating said tracts and their respective values, were when the said raise in valuations thereon were made, accepted and approved by the Board of Equalization, said lands being not only assessed on the rolls by separate tracts for separate values, but being separately rendered and separately valued on said rolls from the personal property or so called personal property of plaintiffs, as aforesaid.

IX.

Plaintiffs further aver that the rate of taxation for state and county taxes, for property in Wichita County, for the year 1923, was 75c on the $100.00 valuation for state purposes and as a state tax; and 80c on the $100.00 valuation of property for county purposes as distinguished from state purposes, the aggregate state and county tax being $1.53 on each $100 valuation of property; and because of said excessive valuation of personal property in the sum of $718,300.00, defendant, Wichita County, is claiming from plaintiffs the sum of $13497.58; that as taxes on said land as assessed and valued by said Commissioners Court, and as taxes on said personal property as valued and assessed by said Commissioners Court, plaintiffs owe the sum of only $6959.01; but, notwithstanding this, said defendant county is claim-

ing and asserting a tax indebtedness against these defendants, because of said wrongful and fraudulent assessment of personal property, as aforesaid, of the aggregate amount of approximately $6438.57, and that if said plaintiffs' personal property in Wichita County, as well as the said lands, had been taxed and assessed on the basis of the real and true facts as to the existence of said personal property and the value of said property of plaintiffs in said county on January 1, 1923, for taxation purposes, plaintiffs would not owe and do not owe for state and county taxes, other than the said sum of $7005.51.

X.

Plaintiffs aver that said School District taxes appearing on the tax rolls of said County as a charge
10 of $684.50, as school District taxes for District No. 3 of Wichita County, Texas, are to the extent of $500.00 void because said item to the extent of said amount just stated, is made up of a pretended assessment of personal property of said plaintiffs, which said personal property assessment is arrived at, made up and claimed because of producing wells owned by plaintiff, W. T. Waggoner, in said District on January 1, 1923, which were on lands under leases as heretofore set out in this Bill of Complaint, and which oil in, on and under said lands was not, as a matter of law, the property of plaintiffs, subject to taxation under the laws of Texas, nor was it taxable against plaintiffs, as they are informed and believe, under the laws of Texas, either as realty or in the interest of realty, nor as personal property. That said taxes on said so called personal property in said School District were found and the

values fixed arbitrarily, without facts on which to base said conclusion; that said School District Tax, to the amount stated, is grossly excessive and is the result of error in the fixing thereof.

XI.

Plaintiffs further aver that the said excess so claimed by said defendant county, over and above the amount of taxes actually owed, as aforesaid, is, as hereinbefore shown, the direct result of the arbitrary, illegal and discriminatory tax against personal property claimed to have been held and owned by plaintiffs, the sum hereinbefore named, to-wit $6438.57, for the year 1923, is the fair proportion of these plaintiffs of the taxes due and assessable against their property for said year, and by assessing said property on the basis that would produce this amount of taxes the said property assessed throughout the State of Texas, and particularly in Wichita County, save and except as to the personal property of others hereinbefore shown, which by the action of said Commissioners Court, has been freed and exempted from taxation.

Notwithstanding the facts aforesaid, the said defendant, Guy C. Raley, Tax Collector of Wichita County, as aforesaid, acting under direction of the other defendants herein, is insisting upon the payment of said amount of tax so illegally leveled, assessed, and equalized, and will, unless restrained, sue therefor and levy by reason thereof upon the property of the plaintiffs to collect the same.

If the said Commissioners Court had acted fairly and legally with reference to the personal property of plaintiffs in Wichita County, Texas, for the taxable year

of 1923, and had not pursued the illegal system and theory hereinbefore alleged, and had not thereby and
11 in the ways hereinbefore shown wrongfully and illegally discriminated against plaintiffs, said Court would have reduced said rendition made by plaintiffs when said Court set as a Board of Equalization to an amount, as to said personal property, not exceeding the sum of $163.80, for state and county taxes, instead of increasing the same; and not to exceed $11788.65 for said School District taxes.

XII.

Plaintiffs would with respect show to the Court that the acts of the defendants set out in each of the subdivisions of this bill of complaint, deprived the plaintiffs of the benefit of the equal protection of the laws of the country with other citizens, both as to the laws of the State of Texas and of the United States, with reference to the rendition and taxation of their property, and deprived them of their property without due process of law, and those acts amounted to a taking of their private property for public use without compensation, contrary to the Constitution of the United States and the Fourteenth Amendment thereto and the other amendments thereof.

Plaintiffs further aver that under the Statutes of Texas, the action of the said Commissioners Court, sitting as a Board of Equalization, aforesaid, became final and conclusive, that being the highest tribunal under the laws of said State to which in a tax statute procedure a taxpayer could go or resort for relief from the excessive or wrongful assessment of its taxes, and such taxpayer is without remedy under the laws of Texas for

relief against such order of said Court, upon the grounds herein stated, save and except in an independent action in a Court of proper jurisdiction.

XIII.

Plaintiffs further show unto the Court that they have offered to pay and have tendered to the defendant, Guy C. Raley, Tax Collector, as aforesaid, the whole and entire amount of taxes owed by them, and have tendered him all of the taxes which could have lawfully been assessed upon their property in Wichita County, for said tax year 1923, and here now offer to pay into the registry of this Court, for appropriation to such taxes, the full amount which could be validly or lawfully assessed against them upon their property in said county for said year.

That although plaintiffs tendered to said Tax Collector, as aforesaid, the amount of the State and County tax on the separate tracts of land, as aforesaid, as shown by said Tax Collector's rolls and records, the said Tax Collector declined and refused and still declines and refuses to accept the said taxes so due on said lands, as aforesaid, asserting that said payment of taxes on said lands would not accepted, payment thereof credited and receipts therefor issued unless and until plaintiffs should also pay in addition to the tax on said lands, all taxes for personal property either assessed or claimed by Wichita County as being owned by plaintiffs, which said amount of said taxes on personal property so claimed was more than $4000.00.

12

Plaintiffs also offered to pay and tendered to said Tax Collector the sum of $184.50 on account of said items of $684.50, as taxes for School District No. 5, said

amount here stated being all the taxes plaintiffs would owe on the said lands in said School District on the valuation thereof at which they were rendered or found and determined by the said Commissioners Court sitting as a Board of Equalization, and excluding therefrom the so called personal property part of said item as aforesaid.

XIV.

Plaintiffs further aver that under the laws of Texas a penalty of 10% is assessed and added to the foregoing claimed tax obligation for said large amount of personal property, as well as said land, and said penalty will be applied by said defendant, Wichita County, and its collection asserted, that in addition to the said tax assessment and the said tax claim asserted by Wichita County being void and non-enforcible for fraud, as hereinbefore set out, plaintiffs aver that under the Statutes of Texas the defendant, Wichita County, is entitled to proceed by summary process and in a summary way, without Court proceedings of any kind, if it so desires and elects, and by virtue of said claim for taxes, as aforesaid which is controverted herein, levy on any personal property which plaintiffs have in Wichita County, Texas, or elsewhere, and sell same under such process, and in event plaintiffs have no personal property in Wichita County, or elsewhere, upon which levy can be made, that a levy for said claimed taxes can be made on the lands of the plaintiffs and said lands sold for said taxes. That the taxes so accrued and due by plaintiffs on the said lands, as aforesaid, as well as the said 10% penalty, are secured under the laws of Texas by a lien on said lands respectively, and the maintenance by said defendant, Wichita County, of a lien thereon because of the said refusal to

accept said taxes on said lands separately, constitutes a cloud on the title of plaintiffs to said lands.

Plaintiffs further aver that they are informed and believe that there is no statutory authority or right whereby unlawful and void taxes, voluntarily paid, may be recovered back, but the laws of the State of Texas, as construed by the Supreme Court of the State of Texas, the highest Court of said state, permit the enjoining of such void and invalid taxes, and plaintiffs further aver that they are without adequate remedy, and at least are without a remedy as adequate and complete as that of a proceeding in equity to restrain the collection of said taxes.

Plaintiffs further aver that unless the collection of said taxes, as aforesaid, is restrained by this Honorable Court, these plaintiffs will, for the reason and facts hereinbefore set forth, suffer irreparable damage. They further aver that said defendant, Wichita County, is threatening to and will collect said taxes by resorting to the means and remedies afforded it by the said laws aforesaid.

XV.

Plaintiffs further aver that under the laws of Texas the action of the said Board of Equalization as aforesaid was final and conclusive, and that the said laws of Texas provide no method of appeal or review by appeal thereof, the only remedy under the laws of Texas being by a separate, independent proceeding in a different Court of proper jurisdiction.

For as much therefore, as plaintiffs are without remedy in the premises except in a Court of equity, and to the end that they may obtain from this Honorable Court

the relief to which they by right are entitled, they respectfully pray this Court to grant unto them a writ of subpoena to be directed to the said defendants and each of them herein named, commanding the requiring them to appear and answer hereto, but not under oath, the answer under oath of each of them being hereby expressly waived; and that said defendants and each of them, their agents, attorneys, and employees and each and every of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the plaintiffs or either of them, the collection of the said illegal and excessive taxes or any part thereof, or against either of them, and restraining them from instituting any suit or taking out any plenary process for or on account of said taxes; and that these plaintiffs have such other and further relief as to the Court may seem just and equitable in the premises; plaintiffs herein expressly agreeing to pay to the said defendant Wichita County any taxes which this Court by its decree may find to be valid and lawful taxes.

14 Plaintiffs further pray that they be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the said defendants, their agents, attorneys and other representatives, and such agents, attorneys and other representatives and each and every of them, be enjoined and restrained as hereinbefore prayed, and that upon final hearing the said injunction may be made perpetual.

Wherefore, plaintiffs pray that a writ of subpoena issue herein, directed to the defendants and each of them,

commanding them on a day certain to appear and answer this Bill of Complaint.

THOMPSON, BARWISE & WHARTON,
Attys. for Plaintiffs.

State of Texas,
County of Tarrant.

Before me, the undersigned authority, on this day personally appeared R. L. More, who after being by me first duly sworn, on oath states that he is the agent of the plaintiffs herein; that as such he is authorized to verify this pleading; that he has read and is familiar with the allegations in this Bill of Complaint and that the facts therein stated are true as the same are set forth.

R. L. MORE,

Subscribed and sworn to before me this 29th day of January, A. D. 1924.

NANCY SMITH,
(Seal) Notary Public, Tarrant County, Texas.

---

15 AMENDED BILL OF COMPLAINT.

Filed Mar. 27, 1924.

To the Honorable Judges of the District Court of the United States for the Northern District of Texas:

Now come the plaintiffs herein and with leave of the Court first had and obtained amend their bill of complaint herein as follows:

I.

At the end of the 20th line in the VII section of the bill of complaint on page 11 thereof immediately following the six words, "three thousand barrels of crude oil," insert the following allegations:

The said leases on said lands for the mining of oil and gas therefrom so executed by plaintiff, W. T. Waggoner, were all in writing and covered all of the lands from which the oil deferred to in the tax assessment of said plaintiffs as constituting personal property
16 herein described was being produced on January 1st, 1923. The language and form and the terms and provisions of the said leases were, so far as herein relevant or material, substantially identical in legal effect, but containing some differences in the language thereof, but each lease on each and every of said tracts of land was practically identical, with the forms thereof attached hereto, marked respectively Exhibits A, B, C, D, and E, being five in all and made a part hereof as if fully set forth herein, such exhibits being designated respectively as form No. 1, No. 2, No. 3, No. 4, and No. 5. In addition thereto there was a lease executed by plaintiff, W. T. Waggoner, so in effect on said date in favor of the Texas Company, covering approximately eleven thousand (11,000) acres of land, a part of which was land from which the oil referred to in said tax assessment was being produced, the terms of which Texas Company lease are hereinafter more fully set forth.

Plaintiffs aver that the lessees or the assignees of the lessees respectively in said several leases so executed had accepted the terms and provisions of the original lease; that said leases long prior to and on January 1st,

1923, were in full force and effect; that the lessees or the assignees of the lessees respectively were then in possession of the said respective leases and were mining and developing for oil the lands described in such respective leases, and said leases had not been forfeited, but were in full force and effect;

That while grounds for forfeiture as to said
17 Texas Company had, according to the contention of the plaintiffs, existed and did exist, plaintiffs, nevertheless, had not then and did not within the said year, 1923, elect to declare and did not declare within that year a forefeiture thereof nor has it yet done so, so that the said Texas Company Lease on January 1st, 1923, and throughout that year was and now is in effect and in existence;

That by said Texas Company lease, plaintiff, W. T. Waggoner, for a consideration of five ($5.00) dollars to him in hand paid by the Texas Company and the royalties to be paid and the covenants to be kept by the Texas Company, granted, bargained, sold and conveyed to the said Texas Company all the oil, gas and other minerals in and under the lands covered thereby, together with the exclusive right of ingress and egress at all times for the purpose of prospecting, drilling, mining, and otherwise operating thereon, reserving, however, the royalties of one-eighth (1/8) of the oil or an amount of oil equal to one-eighth (1/8), and that by the execution and delivery of said lease and the acceptance thereof by the said lessees and their respective assignees, and the taking of possession thereof by the said lessees, and by reason of the fact of the existence of said leases on January 1st, 1923, the said oil and gas thereby became segregated and severed from the surface rights of said lands, and said plaintiffs herein by virtue of said facts

thereby parted with all right, title and claim to the said oil in, on and under said land, having and possessing no other right or benefit other than the right of re-entering in event of breach or forfeiture of con-
18 ditions by lessees or their assignees and the right to receive from said lands when the same was produced an amount of oil equal to one-eighth (1/8) thereof deliverable to plaintiffs after the production thereof from said land and deliverable as produced crude oil brought to the surface and delivered into pipe lines, tanks or other receptacles for the receipt thereof from the respective wells, and the said oil and gas rights in said lands became hence the property of the said lessees or their respective assignees and was not property the title to which was in plaintiffs herein or either of them, and was not property, as plaintiffs are informed and believe, and thereupon charge the fact to be, that was subject to taxation as such against them or either of them.

Plaintiffs further aver that if the said property or property rights represented by their interest in said oil and oil leases aforesaid, do not under the foregoing facts constitute land belonging to them, (and plaintiffs contend that they do not constitute land), then in the alternative they aver that the said property and rights are not such as are taxable under the law, in that they are contingent, speculative, and wholly intangible; and in the further alternative they aver that if such property and rights as aforesaid, are or were taxable against them or either of them on January y, 1923, that such property and rights were merely intangible personal properties; they constituted no more than a mere chose in action not taxable in Wichita County, but if taxable, only in Tarrant County, the domicile of plaintiffs.

II.

In the third line from the bottom of page 12 of the bill of complaint in paragraph VII thereof, immediately following the six words, "clear and exempt from such taxation," insert the following:

That the failure and omission of the said Commissioners' Court and the Tax Assessor and other authorities of Wichita County to render and assess for taxes the said personal property hereinbefore described was the systematic and intentional act of said tax authorities; that the said personal property of the kinds and character hereinbefore set out as being the property of the holders and operators of oil leases was purposely left free from tax, when under the laws of Texas said property should bear and is subject to bear its proportionate part of taxes and to stand its just proportion of the burden of providing the necessary revenue for the government, and violates hence the laws of Texas requiring uniformity and equality in the administration of the revenue laws of said state, and said act resulted in and amounted to depriving these plaintiffs of due process of law guaranteed to them by the Constitution of the United States and the Fourteenth Amendment thereto; that the said acts of the said tax officials in failing to assess the said personal property as aforesaid was systematic, in that all property of the said kind and class of oil operators and developers, as plaintiffs are informed and believe, and thereupon charge the fact to be, was left free, clear and exempt of all taxes, and being a systematic and purposeful omission and failure to so tax said property, said act contravened the said constitutional provisions aforesaid.

III.

At the conclusion of paragraph or section VII of said bill of complaint, immediately following the statement in said bill of complaint, to-wit, "On January 1st, 1923, on page 13 thereof, insert the following:

Plaintiffs aver that a true copy of the rendition so made by their said agent to Wichita County for the year 1923 is attached hereto and marked Exhibit D, and ask that the same be taken and made a part hereof the same as if fully copied herein. They further aver that plaintiffs' said agent in setting forth on said rendition the statement thus, to-wit: "Total number of producing wells, 143; Royalty 723, $325,350.00." was so made on and as a part of a regular or printed form furnished by the said tax assessor of Wichita County, Texas, and in conformity with a request from said officer to use such form, the said form showing not only land and the number of acres, but the number of oil wells, and the depth thereof and the daily production in barrels of oil from said lands. That said agent in so setting forth the said number of producing wells, as aforesaid, as a part of said tax rendition, did so in compliance with what said agent was advised was the desire and the wish and the plant of the said tax authorities in Wichita County in making such rendition, said county having for the tax year, 1923, evolved and promulgated a plan or system whereby said tax authorities required, or at least sought from taxpayers having lands from which such taxpayers were entitled to royalty oil, a statement such as the foregoing.

Plaintiffs aver that if the said rendition so made by the said agent, as aforesaid, amounted to a representation or statement that the said producing wells or the oil therefrom should be separately taxed from
21 land or taxed as personal property of plaintiffs in Wichita County, or taxed in any other way than as required by the laws of the State of Texas, then in such event plaintiffs aver that the said representations so made as to said royalty interests, rights or privileges and as to the same constituting either land or personal property or constituting any other species or character of property other than such as the law denominates it and determines, were the result of mistake on the part of the said agent and was likewise, as plaintiffs are informed and believe, and thereupon charge the fact to be, a mistake on the part of the said tax authorities of Wichita County, Texas; but regardless of the foregoing, the said tax authorities refused to accept said rendition as made, and repudiated the same by raising the values thereon.

Plaintiffs further aver that the defendants herein knew or should have known or by law were charged with knowledge of the fact that said property was required to be and should be taxed as to the character of the property as required and determined by the laws of Texas.

Plaintiffs further aver that when the said hearing was held before the said Commissioners' Court aforesaid, sitting as a board of equalization, and when the said Court refused to accept the said rendition so made by plaintiffs' said agent, as aforesaid, showing the number of said producing wells and the royalty estimated on the basis of daily production at the sum of $325,350.00, but raised said amount, plaintiffs' said agent thereupon

stated that said portion of said rendition was withdrawn and said statement so referred to in said rendition was thereupon recalled.

That said tax authorities of Wichita County were in no way mislead or deceived thereby and have not suffered any injury or prejudice as a result thereof; that said rendition as to said statement hereinabove alluded to did not mislead or deceive the said tax authorities, for that said tax authorities had set about, planned and undertook for the tax year of 1923 to assess for taxation the royalty rights, interest and privileges of the royalty owner on the said basis and in the way set forth in the said rendition so made by plaintiffs' agent, and the act of the said taxing authorities of said county in so assessing said royalty rights, interest and privileges in the way in which they were assessed was not the result of nor were they caused so to do thru the act of said agent of plaintiffs aforesaid, but as the result of their own plan and upon a theory initiated by said tax authorities or some of them.

Plaintiff further avers in this connection that the said rendition of plaintiffs said rights on the basis of one thousand ($1,000) dollars per barrel was unlawful, discriminatory and void in that the producers oil was accepted by said tax authorities and taxed on the basis of four hundred and fifty ($450.00) dollars per barrel daily production; that is to say, the rights and privileges of the plaintiffs herein as the royalty holders or beneficiaries were valued on the basis of one thousand ($1,000) dollars per barrel daily production, and the oil coming from the same land and from the same well, but the property of the producer, was valued on the basis of four hundred and fifty ($450.00) dollars per barrel daily production;

While plaintiffs contend that said property
23 and rights of plaintiffs herein resulting from the royalty provisions of said leases do not constitute property and rights that are taxable, they yet aver that in event it shall be held that the tax authorities of Wichita County, under facts and proof adduced, in good faith made said differences in the valuations of the property and rights of the royalty holders as compared to the producer, then in such event plaintiffs aver that the said act of the said tax authorities in so valuing the said respective rights was the result of gross error and mistake on the part of said tax authorities and their said act so occurring resulted in a grossly excessive levy or valuation on the property of the royalty holder as compared to the property or rights of the producer and has operated as a wrongful discrimination against the said royalty holder.

Plaintiffs and each of them aver that in event it shall be held and determined by this Court that their said property and rights are under the law taxable, they then here offer to have said property rendered and assessed in such way as the law required and as determined by decree of this Court, and at a valuation fixed by this Court which shall be fair, reasonable and lawful and said property to be rendered and assessed in such county as the law and the decree of this Court shall determine.

Plaintiffs are not advised and do not know the way in which the law will classify or determine said property and the character thereof for taxation purposes, but they here offer to pay any lawful tax assessed against said property for January 1, 1923, as this Court by its decree shall determine.

THOMPSON, BARWISE & WHARTON,
Attorneys for Plaintiffs.

24 State of Texas,
County of Wilbarger.

R. L. More, being duly sworn deposes and says that he is the agent of the plaintiffs herein, with authority to verify in behalf of plaintiffs the foregoing amended bill of complaint. That he has read the foregoing bill of complaint and knows the contents thereof; that same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

R. L. MORE.

Sworn to before me this ... day of March, A. D. 1924.

G. E. ALLMAN,

(Seal) Notary Public, Wilbarger County, Texas.

---

25 DESIGNATED AS FORM NO. 1.

EXHIBIT A.

The State of Texas,
County of Wilbarger.

Agreement made and entered into this February 10th, 1922 by and between W. T. Waggoner, of Tarrant County, Texas, acting by R. L. More, his agent and attorney in fact, hereinafter called Lessor and Texhoma Oil & Refining Company, of Wichita Falls, Texas, hereinafter called Lessee, witnesseth:

That for and in consideration of the sum of One Dollar, cash in hand paid for the receipt of which is hereby acknowledged, and the further consideration of the sum

of $4,000.00, to be paid in oil produced from said premises, said payment to be made not later than the tenth day of each month, for the preceding month, and not less than one fourth of the oil so produced to be applied on this indebtedness, and the covenants and agreements hereinafter set out to be kept and performed by the lessee, have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee, for the sole and only purpose of drilling and mining for gas and oil, the following lands, in Wichita County, Texas, to-wit:

Being the South one-half (S. ½) of the Southwest one fourth (S. ¼) of the North West one fourth (N. W. ¼) of Section No. Thirty Four (34) in Block No. Five (5) of the H&TC Ry Co. surveys.

Also the South one half (S. ½) of the South West one fourth (S. W. ¼) of the North East one fourth (N. E. ¼) of Section No. Thirty four (34) in Block No. Five (5) of the H&TC Ry. Co. surveys, containing in the aggregate 40 acres more or less.

Lessee agrees and binds himself to pay an annual rental of One Dollar and Fifty Cents per acre until actual drilling is begun hereon, and failure to pay said rental when due at the option of the lessor shall void this lease.

Subject to the terms and conditions herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however no one well shall hold more than ten acres, in a square form, said well being the center thereof.

In consideration of the premises, the lessee covenants and agrees:

To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1-8) part of all the oil and gas produced and said premises, settlement to be made not later than the tenth day of each month for the preceding month.

That the lessee will pay 7-8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price.

When requested the lessee will bury all pipe
26 lines below plow depth.

That the lessee will use no water from the premises of said lessor without the written consent of the lessor.

That if at any time this lease shall become the property, direct or indirect, of the Texas Co., or the Texas Pipe Line Co., or any person or persons, trustee or otherwise, for the use and benefit of said companies, or either of them, this lease shall immediately become null, void and of no effect and said premises and all rights hereunder shall immediately revert to the lessor herein.

No rotary drilling shall be done hereon, without the written consent of the lessor.

The lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

This lease shall extend to the heirs and assigns of all parties herein, subject to the limitation herein.

This instrument constitutes the entire contract between the parties hereto.

Witness the day and date above written.

W. T. WAGGONER,

By .....

His Agent and attorney in fact.

The State of Texas,
County of Wilbarger.

Before me, a Notary Public, within and for the State and County aforesaid on this day personally appeared R. L. More, agent and attorney in fact for W. T. Waggoner, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and official seal this the 10th day of Feb., 1922.

.....

Notary Public, in and for Wilbarger County, Texas.

27 EXHIBIT B.

Designated as form No. 2.

Commercial.

The State of Texas,
County of Wilbarger.

Agreement made and entered into this June 14th, 1922, by and between W. T. Waggoner of Tarrant County,

Texas, acting by R. L. More, his agent and attorney in fact, hereinafter called Lessor and James A. Moore of New York, N. Y., hereinafter called Lessee, witnesseth:

That for and in consideration of the sum of One Dollar, cash in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the sum of $21,200 00, to be paid in oil produced from said premises said payment to be made not later than the tenth day of each month for the preceding month, and not less than one-fourth of the oil so produced to be applied on this indebtedness, and the covenants and agreements hereinafter set out to be kept and performed by the lessee, have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee, for the sole and only purpose of drilling and mining for gas and oil, the following lands, in Wichita County, Texas, to-wit:

53 acres out of Section No. Fourteen (14) of the HT&B R R Co. survey, as follows: Beginning at a stake in prairie, 2520 feet west of the S. E. cor. of said Sec. 14, and said point being the S. W. cor. of 50 acres heretofore leased to Hockaday and Shaw; Thence West with the S line of said Sec. 14, 613.3 feet a stake, the S. E. corner of Texas Co. lease out of said Sec. 14; Thence North with the East line of said Texas Co. tract 37.62.6 feet a stake in the S. E. line of the original town of Electra, Texas; Thence N. 82 11′ E. with said townsite line, 488.7 feet a stake in the S. B. line of the FW&DC Ry. right of way; Thence S 63 28′ E. with the said right of way S. line to the N. W. corner of said Hockaday & Shaw lease; Thence south with the west line of said Hockaday and Shaw lease 3795.6 feet to the place of the beginning.

Lessee agrees and binds himself to pay an annual rental of One Dollar and Fifty Cents per acre until actual drilling is begun hereon, and failure to pay said rental when due at the option of the lessor shall void this lease.

As a part of the consideration hereof, the lessee covenants and agrees and binds himself, to begin the actual drilling of a well on said premises within three years from date hereof, and to prosecute the drilling thereof with due diligence to a depth of 2000 feet, unless oil or gas is found in paying quantities at a lesser depth. If no well be commenced hereon within three years from date hereof, or if a well is begun and the drilling thereof is not prosecuted with due diligence, as herein provided, or if said well is abandoned or drilling thereon shall cease for as much as 30 days at any time, then this lease shall immediately become null, void and of no effect and shall automatically revert to the lessor herein, with or without action in any Court, but no drilling is imposed and no forfeiture for failure to continue drilling shall be exercised until said three years shall have expired.

All tools and materials placed on said lease by the lessee or those acting for or under him, shall be liable to and stand for whatever expense the lessor may be to in the plugging or abandonment of said well or the completion of said well, as the lessor may choose.

27½ In case the first well drilled hereon shall be a dry hole or for any reason abandoned then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

Subject to the terms and conditions herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however, no one well shall hold more than ten acres, in a square form, said well being the center thereof.

In consideration of the premises, the lessee covenants and agrees;

To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1-8) part of all the oil and gas produced on said premises, settlement to be made not later than the tenth day of each month for the preceding month.

That the lessee will pay 7-8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price.

When requested the lessee will bury all pipe lines below plow depth.

That the lessee will use no water from the premises of said lessor without the written consent of the lessor.

That if at any time this lease shall become the property, direct or indirect, of the Texas Co., or the Texas Pipe Line Co., or any person or persons, trustee or otherwise, for the use and benefit of said companies, or either of them, this lease shall immediately become null, void and of no effect and said premises and all rights hereunder shall immediately revert to the lessor herein.

The lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

This lease shall extend to the heirs and assigns of all parties herein, subject to the limitation herein.

This instrument constitutes the entire contract between the parties hereto.

Witness the day and date above written.

W. T. WAGGONER,

By .....

His agent and attorney in fact.

(Acknowledgment for R. L. More).

28 EXHIBIT C.

Designated as Form No. 3.

The State of Texas,
County of Wilbarger.

Agreement made and entered into this Nov. 22nd, 1922, by and between W. T. Waggoner, of Tarrant County, Texas, acting by R. L. More, his agent and attorney in fact, hereinafter called Lessor and T. G. Lomax, of Wichita Falls, Texas, hereinafter called Lessee, witnesseth:

That for and in consideration of the sum of One Dollar, cash in hand paid, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter set out to be kept and performed by the lessee, have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee, for the sole and only purpose of drilling and mining for gas and oil, the following lands in Wichita County, Texas, to-wit:

Being 40 acres out of Section No. Thirteen (13) HT&B RR Co. Surveys, and bounded as follows:

Beginning at a stake in the South line of said Section, 1920 feet west of the S. E. cor. thereof; Thence West with said south line 1100 feet a stake in said south line; Thence North 1580 feet a stake; Thence East 1100 feet a stake; Thence South 1580 feet to the place of beginning.

Being the same land heretofore leased to said T. G. Lomax, and which said former lease has not been drilled on or in any way operated as conditioned therein.

As a part of the consideration hereof, the lessee covenants and agrees and binds himself, to begin the actual drilling of the first well on said premises within 31 days from date hereof, and to prosecute the drilling thereof with due diligence to a depth of 2000 feet, unless oil or gas is found in paying quantities at a lesser depth. If no well be commenced hereon within 31 days from date hereof, or if a well is begun and the drilling thereof is not prosecuted with due diligence, as herein provided or if said well is abandoned or drilling thereon shall cease for as much as 30 days at any time, then this lease shall immediately become null, void and of no effect and shall automatically revert to the lessor herein, with or without action in any Court.

The lessee shall within 60 days from the completion or abandonment of one well, begin the next well and the drilling thereof shall be under same conditions as the first well herein, and will continue to drill additional wells as provided for in the second well until he shall have dug a well on each 10 acres in this lease.

All tools and material placed on said lease by the lessee or those acting for or under him, shall be liable

to and stand for whatever expense the lessor may be to in the plugging or abandonment of said well, or the completion of said well, as the lessor may choose.

Subject to the terms and conditions herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however, no one well shall hold more than ten acres, in a square form, said well being the center thereof.

In consideration of the premises, the lessee covenants and agrees:

29 To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1-8) part of all the oil and gas produced on said premises, settlement to be made not later than the tenth day of each month for the preceding month.

That the lessee will pay 7-8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price.

When requested the lessee will bury all pipe lines below plow depth.

That the lessee will use no water from the premises of said lessor without the written consent of the lessor.

That if at any time this lease shall become the property, direct or indirect, of the Texas Co., or the Texas Pipe Line Co., or any person or persons, trustee or otherwise, for the use and benefit of said companies, or

either of them, this lease shall immediately become null, void and of no effect and said premises and all rights hereunder shall immediately revert to the lessor herein.

No rotary drilling shall be done hereon, without the written consent of the lessor.

The lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

This lease shall extend to the heirs and assigns of all parties hereto, subject to the limitation herein.

This instrument constitutes the entire contract between the parties hereto.

Witness the day and date above written.

W. T. WAGGONER,

By .....

His agent and attorney in fact.

(Acknowledgment for R. L. More).

30 EXHIBIT D.

Designated as Form No. 4.

The State of Texas,
County of Wilbarger.

Agreement made and entered into this May 11th, 1922, by and between W. T. Waggoner, of Tarrant County, Texas, acting by R. L. More, his agent and attorney in fact, hereinafter called Lessor and Humble Oil & Refining Co., of Wichita Falls, Texas, hereinafter called Lessee, witnesseth:

That for and in consideration of the sum of One Dollar, cash in hand paid the receipt of which is hereby acknowledged, and the further consideration of the sum of $20,000.00, to be paid in oil produced from said premises, said payment to be made no later than the tenth day of each month, for the preceding month, and not less than one fourth of the oil so produced to be applied on this indebtedness, and the covenants and agreements hereinafter set out to be kept and performed by the lessee, have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee, for the sole and only purpose of drilling and mining for gas and oil, the following lands, in Wichita County, Texas, to-wit:

50.4/10 acres out of Section No. 14 H. T. & B. R. R. Co. survey, Abstract No. 505, of Wichita County, Texas, and bounded as follows:

Beginning at a stake in the E. line of said Sec. 14, 1189 feet North of the S. E. corner of said survey; Thence West 1320 feet a stake, the S. W cor. of this tract; Thence North 1951 feet a stake in the S. B. line of the F. W. & D. C. Ry. Co., right of way; Thence S. 63 25' W. with said right of way 1475.4 feet a stake in the E. line of said Sec. 14; Thence South with said East line and the center of the Archer City & Electra road 1320.7/10 feet to the place of beginning.

As a part of the consideration hereof, the lessee covenants and agrees and binds himself, to begin the actual drilling of a well on said premises within 30 days from date hereof, and to prosecute the drilling thereof with due diligence to a depth of 2000 feet, unless oil or gas

is found in paying quantities at a lesser depth, If no well be commenced hereon within 30 days from date hereof, or if a well is begun and the drilling thereof is not prosecuted with due diligence, as herein provided, or if said well is abandoned or drilling thereon shall cease for as much as 30 days at any time, then this lease shall immediately become null, void and of no effect and shall automatically revert to the lessor herein, with or without action in any Court.

All tools and material placed on said lease by the lessee or those acting for or under him, shall be liable to and stand for whatever expense the lessor may be to in the plugging or abandonment of said well, or the completion of said well, as the lessor may choose.

In case the first well drilled hereon shall be a dry hole or for any reason abandoned, then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

Subject to the terms and conditions herein
31 this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however no one well shall hold more than ten acres in a square form, said well being the center thereof.

In consideration of the premises, the lessee covenants and agrees:

To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1-8) part of all the oil and gas produced on said

premises, settlement to be made not later than the tenth day of each month for the preceding month.

That the lessee will pay 7-8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price.

When requested the lessee will bury all pipe lines below plow depth.

That the lessee will use no water from the premises of said lessor without the written consent of the lessor.

That if at any time this lease shall become the property, direct or indirect, of the Texas Co., or the Texas Pipe Line Co., or any person or persons, trustee or otherwise, for the use and benefit of said companies, or either of them, this lease shall immediately become null, void and of no effect and said premises and all rights hereunder shall immediately revert to the lessor herein.

No rotary drilling shall be done hereon, without the written consent of the lessor.

The lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

This lease shall extend to the heirs and assigns of all parties herein, subject to the limitation herein.

This instrument constitutes the entire contract between the parties hereto.

Witness the day and date above written.

W. T. WAGGONER,

By .....

His agent and attorney in fact.

(Acknowledgment for R. L. More).

32 EXHIBIT E.

Designated as Form No. 5.

The State of Texas,
County of Wilbarger.

Agreement made and entered into this 1st day of Nov. 1921, by and between W. T. Waggoner, of Tarrant County, Texas, acting by R. L. More, his agent and attorney in fact, herein after called Lessor and Charles F. Spencer, of Wichita Falls, Texas, hereinafter called lessee.

Witnesseth:

The lessor for and in consideration of the sum of One Dollar, cash in hand paid, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, on the part of the lessee to paid, kept and performed, had granted, demised, leased and let and by these presents does demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for gas and oil, or either, and laying of pipe lines, and building of tanks, powers, stations, and structures thereon, to produce, save and take care of said products, all those certain tracts of land in Wichita County, Texas, to-wit:

All that portion of Sec. 6 Blk 13 of the H. & T. C. Ry Co. survey, and all that part of Secs. 3 & 4 of the G. C. & S. F. Ry. Co. surveys, and all that part of Sec. No. 148 in Blk. 14 of the H. & T. C. Ry. Co. surveys, on the west line of said Wichita Co., not covered by the lease of the Texas Co., aggregating about 317 acres more or less.

It is agreed that this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as oil and gas are found and produced in paying quantities.

In consideration of the premises the lessee covenants and agrees:

1st to deliver to the Lessor, free of all costs, in the pipe line to which said wells may be connected, the equal one eighth part of all the oil and gas found and produced thereon. At the option of the lessor and the lessee will pay the lessor the sum of $200.00 per annum, in advance for the gas from each well in lieu of the one eighth part of said gas.

2nd: To drill on the aforesaid premises at least ten wells, to be located as the lessee shall see fit. At least one of said ten wells shall be drilled to a depth of 2000 feet, unless oil or gas is found at a depth around 1800 feet.

The 1st of said wells shall be commenced within 40 days from date hereof and actual drilling shall be prosecuted with due diligence to completion thereof.

Each of the remaining nine wells shall be drilled by the commencement of a new well not later than 60 days from the completion or abandonment of the preceding well. Failure to drill as herein required shall and does immediately terminate this lease in toto, and no legal acting in any Court shall be necessary on the part of the lessor, and all materials, casing and machinery placed thereon by the lessee shall become the property of the lessor, as liquidated and accrued damages for non-performance of this contract.

If the lessor herein owns less than a fee
33 simple title to said lands, then the rentals and royalties herein provided for shall be paid to the lessor only in proportion which his interest bears to a whole and undivided fee.

The lessee shall have the rigat to use free of cost, gas and water produced on said land for their operations thereon, except water from the wells and tanks of the lessor now on said land.

When requested the lessee will bury all pipe lines below plow depth.

The lessee agrees to pay 7/8 of all increase in taxes on the lands herein, by virtue of oil or gas or either, that may be assessed against said land.

That the lessor shall have the refusal of oil or gas, or either, produced hereon, when same is for sale.

That if at any time this lease shall in any manner transferred, assigned or become the property of the Texas Co., the Texas Pipe Line Co., or any stockholder of said companies, or either of them, such change in ownership shall immediately void this lease and it shall automatically revert the ownership hereof to the lessor, his heirs or assigns.

The lessor agrees and binds himself to warrant and defend the title to the property herein against all legal claims.

This contract shall extend to the heirs and assigns of all parties hereto, subject to the limitations herein.

Witness my hand at Vernon, Texas, this Nov. 1st, 1921.

W. T. WAGGONER.

By .....

His agent and attorney in fact.

(Acknowledgment for R. L. More).

34 FORM B.

I will appreciate it if you will use the rendition forms furnished by me, as they are made to fit my binders.

IRVIN DEATON, Assessor.
Wichita County, Wichita Falls, Texas.

Sheet No. ...

Inventory of Property.

Precinct No. .....

Owned by W. T. Waggoner of Fort Worth, Texas, and rendered for Assessment of Taxes for the year 1923 by R. L. More, of Vernon, Texas, to Tax Assessor of Wichita County, Texas.

Note:—List all property by School Districts on separate sheets; List all fee lands and personal property thereon in each school district together and so mark. Leases and personal property thereon in the same school district may be listed on the same sheet by marking each and listing each separately.

School District No. .....

Abst.	Lot	Block	Original Grantee or Survey (may be abbreviated)	No. of Acres	wells. depth	Total Value
13			J. Bradley	293	nil	1465
533			F. J. Cook	33	nil	165
455			A. Gibson	1220		6400
533			S. Holloway	287		2583
803			M. M. McLauren	32		190
393			Seale & Morris	647		3235
535			Seale & Morris	453		2265

531	Sec.	1		G C & S F Ry.	300	2700
731		2		G C & S F Ry.	297	2695
530		3		G C & S F Ry.	171	1540
738		4		G C & S F	169	1431
586		18		G C & S F Ry.	488	2440
606		20		G C & S F Ry.	225	2025
137		13		H T & B R R Co.	640	3200
505		14		"	384	1920
716		22	5	H & T C Ry.	76	380
110		23	5	"	300	1500
771		26	5	"	640	3200
109		27	5	"	646	3230
761		28	5	"	476	2380
790		30	5		9	45
788		30	5		40	200
106		31	5	"	611	3055
108		33	5	"	618	3090
482		34	5	"	640	3200
105		35	5	"	650	3250
392		5	7	"	354	3185
800		6	7	"	250	2250
688		6	13	"	8	75
122		147	14	"	95	855
784		148	14	"	640	3200
569		1		Texas Central Ry.	141	7000
632		2		"	68	610

Total number of producing wells 143	
Royalty 723	$325,350
Cattle 12 (milch pen)	300
Horses 6	300
2 wagons & Autos 3—5	2000
Tools & Implements	2000

All lands hereon reduced to $5.00 per acre is absolutely useless other than for oil field; fences down, roads in every direction and we are leasing the surface for open grazing at about 10c per acre.

---

35 MOTION TO DISMISS.

Filed Feb. 21, 1924.

Comes now the defendants, Wichita County, Texas, B. D. Sartin, H. H. Haynes, J. P. Jackson L. L. Kuntz, F. R. Knauth and Guy C. Raley, in the above entitled and numbered cause and move the Court to dismiss the bill of complaint filed herein for the following reasons, to-wit:

1.

Because there is no Federal question involved in this cause, and therefore, this Court is without jurisdiction.

2.

Because the bill fails to show that at this time there is any reason to warrant the necessity of an injunction against the defendants in this cause.

3.

Because the bill states no cause of action under the laws of the State of Texas or of the United States, in that it shows no equitable ground to justify the United

States District Court to take cognizance of this cause, as the complainants have not sought or attempted to seek relief in the State Courts of Texas, which they have a right to do.

4.

Because the bill does not show that the defendants at this time are seeking to injure or destroy or molest the complainants or their property in any manner or way.

5.

Because the complainants have an adequate remedy at law and are not entitled to equitable relief.

6.

Because the bill shows no equity justifying the complainants to bring this suit, in that the defendants in this cause have not as yet taken any action toward collecting this money or any portion thereof from the complainants.

7.

Because the bill states no matter of equity entitling plaintiffs to the relief prayed for, nor are the
36 facts stated sufficient to entitle plaintiffs to any relief against these defendants, especially at this time, as the law pertaining to the assessment of these taxes is such that at the present time the defendants cannot enforce the collection of said taxes, and the defendants, at this time have not taken any action toward

the collection of said taxes, and therefore, the complainants are not entitled to any equitable relief and are not entitled to go into the jurisdiction of the Federal Court asking for relief when no act so far has been done or taken on the part of the defendants seeking to enforce collection.

8.

Because the complainants do not allege in their bill any discrimination between the royalty owners in Wichita County, Texas, and these complainants, that is, they do not allege sufficient facts to show that the properties of these complainants were not assessed in like manner and in like way, and for a fair valuation compared to other property owners of similar kind and character of property, as that complained of by the complainants.

9.

Because the bill does not allege inequality in the valuation of the properties belonging to the complainants of similar properties belonging to other parties in Wichita County, Texas.

10.

Because the allegations in the bill fail to state that the Commissioners' Court, acting as a Board of Appraisers of the properties in Wichita County, Texas, for taxation purposes had any design or purpose to discriminate against complainants in a sufficient manner as to show jurisdiction for this cause.

Wherefore, defendants pray judgment of the Court, 1st, that this cause be dismissed and the defendants be allowed to go hence without day, together with their costs; 2nd, but in case however, this prayer be not granted, that they be given a reasonable time within which to answer the allegations of the bill.

E. L. FULTON,
BULLINGTON, BOONE &
HUMPHREY,
Attorneys for Defendants.

---

37 ANSWER OF DEFENDANTS.

Filed Feb. 22, 1924.

Comes now the defendants, Wichita County, Texas, B. D. Sartin, H. H. Haynes, J. P. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley, and in reply to the Bill of Complaint heretofore filed by the Complainants in said Cause No. 152 in Equity, on the 1st day of February, 1924, say:

1.

The defendants make and file this answer subject to their Motion to Dismiss heretofore filed in this cause.

2.

The defendants neither deny or admit on account of the fact that they are not aware of the allegations set forth in the first paragraph of Subdivision No. One of Complainant's Bill.

3.

The defendants admit the facts as set forth in paragraphs Nos. 2, 3, and 4 of Subdivision No. One of said bill.

4.

On account of lack of information, the defendants neither deny nor admit the facts as set forth in Paragraph No. Two, in so far as the amount is concerned, but specifically deny that these defendants have at any time sought to nor are they now seeking to deprive the complainants of any property without due process of law, and for that reason, do not concede the fact that this Bill is sufficient to cause the complainants to bring this suit in the manner and place same has been brought.

5.

In reply to the Third Subdivision of Complainants' Bill, the defendants say that they admit the facts as set forth on pages three and four thereof, but on account of lack of information, neither deny or admit the facts as set forth in the last paragraph of said Subdivision No. Three and which attempts to set forth the personal property owned by them in Wichita County, Texas, on January 1st, 1923.

6.

In reply to the Fourth Subdivision of Complainants' bill, the defendants neither deny nor admit the
38 first paragraph thereof, on account of the fact that they do not have sufficient information to

know whether the properties have been transferred to the Trust Estate or not, but we say that in so far as the records of Wichita County, Texas, show, the properties still stand in the name of W. T. Waggoner, individually, but if it be true that the properties have been transferred to the Trust Estate, the defendants here and now give complainants notice to produce in Court in reply hereof or upon trial hereof the original instrument transferring said properties to the Trust Estate, or copies thereof.

7.

In reply to the Fifth Subdivision of the Complainants' bill, the defendants say that it is true that about the 1st of May, 1923, the Complainants' acting by and through R. L. More rendered said properties owned by Complainants for taxation purposes to the Tax Assessor of Wichita County, Texas, and did not include crude oil on hand.

8.

Defendants further say that the said R. L. More, in rendering said property for taxation to the Tax Assessor Wichita County, Texas, valued the lands in said rendition ranging from $5.00 up and including $9.50 per acre, the principal portion of said lands being rendered at $5.00 per acre, and one tract 140 acres being specially rendered at something less than $50.00 per acre, but in said rendition, the said agent, R. L. More, made the following statement: "All lands herein reduced to $5.00 per acre is absolutely useless other than for oil field, fences down, roads in every direction, and we are leas-

ing the surface for open grazing at about ten cents per acre," and by said rendition, he lowered the rendition of said lands on account of the fact that oil was being produced therefrom, and rendered the surface of the land valueless except for a nominal rental value, and in the same rendition, the said agent, More, rendered the following property for taxation upon the following values: "Total number of producing wells, 143—royalty 723—total value $325,350.00."

That by said rendition, he separated the royalty or value thereof from physical properties, and rendered the same separately, rendering the royalty valued at $325,350.00, and rendering the surface of the land at less than other lands of like kind and character were being rendered in that vicinity where no oil had been discovered thereon.

39 9.

That by reason of said rendition, he separated the royalty or mineral rights in said land from the land itself, placing the same in an independent column.

10.

Defendants further allege that by reason of said rendition heretofore made, and which was in fact and in truth made by the agent of the complainant, they are now estopped from claiming that said royalty or mineral rights in said land was separated therefrom and rendered in bulk, and that they are further estopped from saying that said mineral rights are not taxable in that they, by their rendition, induced the defendants, sitting as a Board of Equalizers, to lower the real values of the

land from what the same would have been assessed had said land not been separated from the mineral rights or royalty.

11.

That by reason of said rendition by the complainants' agent in not rendering the same as real estate, said rendition was by mistake or error placed in the column of "personal property" instead of real property, and the defendants here and now request this Honorable Court to allow and permit them to correct the rendition of said royalty so as to make the same a mineral right or real estate rather than personal property.

12.

In reply to the third paragraph of subdivision No. Five of Complainant's bill, the defendants say that it is true that said royalty was placed in the list with personal property by mistake and error, as the said agent of the complainants had rendered the same separately under the heading of royalty, and by mistake it was placed under the "personal property" column rather than real property or minerals, and that by reason of said agent of complainants rendering said property as he did render the same, complainants are now estopped to say whether or not it should belong in the column of personal property or real property.

13.

Defendants further reply to said paragraph of Subdivision No. Five of Complainants' bill by saying that it is true that the Commissioners' Court acting as a

Board of Equalization, gave due notice of said intention to raise the values of the property set forth in the rendition by the complainants' agent, and did in fact and in truth raise the value thereof to the same value of other properties of like kind and character in Wichita County, Texas, and the defendants here and now
40 deny that said property was rendered for more than the true value of said property, but on the contrary state that said royalty, as well as all of the properties owned by the complainants in Wichita County, Texas, were not assessed for the real or true values thereof, and were not assessed for as much as said property could have been sold for on the market on January 1st, 1923, and that due hearing was given to the complainants' agent and sufficient evidence was heard thereon, and the defendants, sitting as a Board of Equalization, after fully considering the evidence and fully considering the values of said property and especially the value of the royalty thereon, made said value at Seven Hundred Twenty Three Thousand ($723,000.00) Dollars.

14.

In further reply to paragraph No. Three of Subdivision No. Five of Complainant's Bill, the defendants specially deny that the value as placed by them at Seven Hundred Twenty Three Thousand ($723,000.00) Dollars was in any way arbitrary or discriminatory against the rights of the complainants, and specially deny that it was grossly excessive and entirely erroneous, but as a matter of fact the royalty interest and mineral rights in and to said lands were worth a great deal more than Seven Hundred Twenty Three Thousand ($723,000.00) Dollars.

15.

In reply to the Fourth paragraph of Subdivision No. Five of Complainants' bill, the defendants specially deny that in fixing the values of said personal property, which included the royalty or mineral rights of the complainants in and to said real estate located in Wichita County, Texas, as aforesaid, the same was fraudulent, and specially deny that said value of Seven Hundred Twenty Three Thousand ($723,000.00) Dollars was in excess of the value of said property, as said royalty or mineral right was worth a great deal more and could have been sold for a great deal more than One Thousand ($1,000.00) Dollars per barrel on the market on January 1st, 1923.

16.

In reply to Subdivision No. Six of Complainants' bill, the defendants say that the amount of personal property in the sum of Seven Hundred Twenty Eight Thousand Three Hundred ($728,300.00) Dollars included the royalty rights of the complainants upon said land, which, by said rendition had been separated from said lands belonging to the complainants, and that the sum of Seven Hundred Twenty Three Thousand ($723,000.00) Dollars thereof was for royalty or mineral rights on the
41 land belonging to the complainants and the sum of Five Thousand Three Hundred ($5,300.00) Dollars was the value assessed by the Board of Equalization upon the other personal property as rendered by the agent of the complainants, R. L. More, and that said other personal property was equal in value to a great deal more than said sum of Five Thousand Three Hundred ($5,300.00) Dollars, as said other per-

sonal property was valued in the same sum as other property of like kind and character in Wichita County, Texas.

17.

In further repiy to Subdivision No. Six of Complainants' bill, the defendants say that the one-eighth royalty belonging to the complainants, was so specified by the agent of the complainants in the rendition of this property and was so specified by the complainants in the transfer to the different lessees, and these respective rights are in writing, and the complainants are here and now given notice to bring into Court upon the trial hereof, copies of all leases or privileges granted by the complainants to their respective lessees, which the defendants here and now state that in each and all of these leases the complainants reserved the right of the one-eighth royalty to said land and premises owned by complainants, and by reason of the above and foregoing facts, the complainants are here and now estopped to say that they did not own said royalty on said premises and are here and now estopped to say that said royalty is not a part of or incident to, and in fact is an interest in and to the real estate owned by complainants, and which is located in Wichita County, Texas.

18.

In further reply to Subdivision No. Six of Complainants' bill, the defendants specially deny that the mineral rights in and to said premises were ever at any time absolute to the lessees of the different tracts set forth in Complainants' bill, but on the contrary, allege that the Complainants retained the title, right and privilege

of the oil under said premises, at least to the extent of Seven Hundred Twenty Three ($723,000) Dollars more than it was rendered for taxes for by the separation thereof by the agent of the Complainants herein, and the defendants specially deny that under said leases, the lessees and their assigns became and was solely liable and responsible for all state, county and school district taxes assessible on account of the presence and existence of said oil on and under said lands, but on the contrary, the defendants say that in said respective leases, the complainants themselves acknowledged liability to the extent of the royalty to be paid under said leases, and therefore, are now estopped to claim that the lessee is
42 entitled to pay all of said taxes.

19.

In further reply to paragraph Two of Subdivision No. Six of Complainants' bill, defendants specially deny that they were guilty of gross discrimination, manifest evil intention, or any wrongful findings of any kind or character, either intentional or otherwise, in assessing the taxes of the complainants as same were assessed, and specially deny that said taxes were assessed on an unequal or inequitable basis, and specially deny that they were unjust or arbitrary in assessing said taxes, with reference to the facts, and specially deny that said royalty is exempt from taxation, or has ever been freed or relieved from taxation.

20.

In further reply to the second paragraph of Subdivision No. Six of the Complainants' Bill, the defendants spe-

cially deny that the personal property of the respective leases herein taxes, but says that said personal property located on said leases, together with seven-eighths of the interest in said leases were taken as a whole and valued as a whole by the Commissioners' Court sitting as a Board of Equalizers, and that same was assessed upon reasonable values of property of like kind and character in Wichita County, Texas.

21.

The defendants specially deny paragraph Number Three of Subdivision No. 6 of the Complainants' bill in that they say that the Complainant's rights have been denied them in any manner or any way to justify the complainants to appeal to the Fourteenth Amendment to the Constitution of the United States.

22.

Defendants specially deny paragraph No. Four of Subdivision No. Six of the Complainants' bill wherein they aver that the complainants did not have in Wichita County, Texas, the property as mentioned in said assessment, but here say that by mistake the royalty rights, which were not classified by the complainant's agent when same were assessed, were placed on the personal property column instead of the real estate column or the mineral column, and that to the extent of Seven Hundred Twenty Three Thousand ($723,000.00) Dollars of the personal property assessed, the same is incorrect in that the Seven Hundred Twenty Three Thousand $723,000.00) Dollars should have been placed or assessed under the real estate column, and a supplemental roll

thereof has already been made, and levy had in said right of Wichita County, Texas, for the taxes
43 on the mineral rights to the extent of Seven Hundred Twenty Three Thousand ($723,000) Dollars in the classification of real estate or mineral rights and that on account of the rendition of said royalty rights and the rendition in its toto by the complainants' agent, the complainants are now estopped to say that this correction should not be made; and in further reply to said paragraph No. Four of Subdivision No. Six, the defendants say that the valuation of the other personal property of Five Thousand Three Hundred ($5,300.00) Dollars was just and equitable and that an additional rendition of three thousand (3,000) barrels of crude oil should be by these complainants corrected and additional assessment thereof made, and that said oil at that time was worth at least Six Thousand ($6,000.00) Dollars on January 1st, 1923.

23.

In reply to Subdivision No. Eight of Complainants' Bill, the defendants specially deny that they raised the value of said lands of the complainants above the value of lands of like kind and character in Wichita County, Texas.

24.

In reply to the Ninth Subdivision of Complainants' Bill, the defendants say that for lack of information, they neither deny or admit the rate for State, County and School Tax purposes as set forth in said paragraph, but assuming that the rates therein stated by the complainants are correct, and further say that on account

of the error in assessing the royalty as personal property, error has therein been made, but has now been corrected on the same values as they were assessed by being in the wrong classification, and further say that the valuation as assessed by the defendants, as well as the supplemental roll now made are according to the same values of like kind and character in Wichita County, Texas, and are a great deal less than the true values of said property, that is, what the properties could have been sold for on January 1st, 1923, and say that the defendants made the assessment on that basis.

25.

In reply to the Tenth Subdivision of Complainants' Bill, the defendants specially deny that said school taxes are void for the reasons heretofore set forth under previous paragraphs, and specially deny that the royalty rendered by Complainants' agent was non-taxable, and here alleged that said royalty is an interest in realty and if it is not an interest in realty, the same is an interest in mineral rights located on the realty and regardless of whether it is
44 personal property or real property, that it had a value greatly in excess of what same was assessed and is subject to taxation.

26.

The defendants specially deny that said values were arbitrarily fixed or fixed by a conclusion and were grossly excessive, but on the contrary, state that said values were fixed below the reasonable market value thereof on January 1st, 1923, and after due consideration

by said Board of Equalization, as well as the corrected rendition or supplemental roll thereof is based upon a fair and equitable assessment of said taxes.

27.

In reply to the Eleventh Subdivision of Complainants' Bill, the defendants specially deny that the taxes complained of therein are the result of an arbitrary, illegal or discriminatory assessment, but allege the facts to be that said assessment is based upon a fair proportion of the properties belonging to the complainants in comparison with properties of like kind and character situated in Wichita County, Texas, and further say that said property was taxable under the laws of Texas, either as personal or real property or mineral rights, and that same was assessed after a due hearing thereon, and after full consideration thereof.

28.

In reply to the second paragraph of Subdivision No. Eleven, the defendants say that it is true that they are insisting, or rather the Tax Collector of Wichita County, Texas, is insisting upon the payment of said taxes, but deny that said tax was illegally levied and assessed and deny that the complainants have not had their day in Court.

29.

In reply to the Third Paragraph of Subdivision No. Eleven of Complainants' Bill, the defendants deny that they acted in bad faith with reference to the levying of the tax upon said properties and fixing the values

thereof, but specially say that they acted fairly and with the evidence before them, and especially upon the fact that the complainants' agent separated the mineral rights or the royalty from the real property in one bulk rendition, and by reason thereof, is now estopped to deny the right of the defendants to so make the levy accordingly, and if in the opinion of this Honorable Court, the assessment has been wrongfully classified, the defendants pray that they be permitted as they
45 have the right to do under the laws, to make a supplemental roll or supplemental assessment and classify said royalty as a mineral and upon the same basis and upon the same valuation as heretofore made when classified as personal property.

30.

In reply to the Twelfth Subdivision of Complainants' Bill, the defendants specially deny that the Complainants have been deprived of the equal protection of the laws of the country with other citizens, both as to the laws of the State of Texas and of the United States, with reference to the rendition and taxation of their property, and deprived them of their property without due process of law, and those acts amounted to the taking of private property for public use, contrary to the Constitution of the United States and the Fourteenth Amendment thereto and other amendments thereof.

31.

In reply to the second paragraph of Subdivision No. Twelve of the Complainants' Bill, the defendants deny

that the action of the Commissioners' Court sitting as a Board of Equalization became final and conclusive, that being the highest tribunal under the laws of the State of Texas, to which in a tax statute procedure a taxpayer could go for relief from the excessive or wrongful assessment of its taxes, and that such taxpayer is without remedy under the laws of Texas for relief against such order of said Court, but on the contrary, says that if the facts as alleged by the complainants are true, then the acts of the Commissioners' Court, sitting as a Board of Equalization, was not a final judgment, but that the complainants had their remedy in the State Court of Texas, to so show the illegal assessment and levy thereof, and by reason thereof, this Court has no jurisdiction over this cause.

32.

In reply to the Thirteenth Subdivision of Complainants' Bill, the defendants neither admit nor deny the same for the lack of information.

33.

In reply to the Fourteenth Subdivsion of Complainants' Bill, the defendants say that it is true that a penalty of ten percent assessed and is added to the foregoing obligation for taxes, and that the defendants will seek to have the complainants pay said penalty in view of the fact that the complainants would not pay the taxes as assessed, same being duly and legally assessed under the laws of the State of Texas, and the defendants further say in reply thereto that the assessment was not void and non-enforcible for fraud or upon any

other ground, and further allege the facts to
46 be that the defendant, Wichita County, does not intend to proceed summarily without Court proceedings to collect said taxes, but by reason of this statement, does not intend to bind the County in any manner or way at any time hereafter to not so proceed, and the defendants further allege that the taxes, as well as a ten percent penalty is a lien upon the property described in Complainants' bill.

34.

In reply to the second and third paragraphs of Subdivision No. Foureeen of Complainants' Bill, the defendants specially deny the allegations therein set forth.

35.

In reply to the first and second paragraphs of Subdivision No. Fifteen, the defendants specially deny each and every allegation therein contained and say the same are not true either in whole or in part, but on the contrary say that said taxes were duly and legally and rightfully assessed, and if in truth and in fact they were not so duly and legally and rightfully assessed, that the Courts of the State of Texas would allow and permit the complainants to enjoin the assessment thereof, and it was not necessary for the complainants to go into the Federal Court for the purpose of having their rights adjudicated.

Wherefore, premises considered, the defendants specially pray that said injunction be in all things denied and that this Honorable Court decree that the taxes were

duly and legally assessed, and if the Court should in any manner or way decide that the assessment of the taxes under personal property was error, then these defendants specially request that their supplemental roll be allowed to stand and said property, that is, the royalty interest in said lands or property be assessed as under the laws of the State of Texas they are entitled to, and for such other relief that this Honorable Court in its equity powers may grant to these defendants.

E. L. FULTON,
BULLINGTON, BOONE & HUMPHREY,
Counsel for the Defendants, Wichita County, H. H. Haynes, J. P. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley.

The State of Texas,
County of Wichita:

Before me, the undersigned authority, on this day personally appeared B. D. Sartin, County Judge of Wichita County, Texas, and Guy C. Raley, Tax Collector
47 of Wichita County, Texas, both of whom being by me first duly sworn, on oath depose and state that they have read over the foregoing answer, and that the matters therein set forth are true and correct to the best of their knowledge and belief.

Witness our hands this the 21st day of February, A. D. 1924.

B. D. SARTIN,
Co. Judge.
GUY C. RALEY,
Tax Coll.

Sworn to and subscribed before me this the 21st day of February, A. D. 1924.

ZOE TOWNSEND,
Notary Public in and for
Wichita County, Texas.

(Seal)

---

48 DEFENDANT'S REPLY TO COMPLAINANTS' AMENDED BILL.

Filed Mar. 22, 1924.

Come now the defendants in the above entitled cause, in answer to that portion of the complainants bill which they have amended, and say as follows:

I.

In reply to the first amendment in Section 7, for lack of information they neither admit nor deny the allegations as set forth in the first three paragraphs thereof.

II.

In reply to the fourth paragraph the defendants deny specially and specifically that the entire eight-eights of the oil was conveyed to the lessee, The Texas Company, but allege the facts to be that only seven-eighths of the oil was conveyed and that the one-eighth of the oil was never conveyed, but in fact was turned over to the Texas Company, the lessee, for the purpose of being extracted from under the ground and lifted to the top of the ground to there be re-delivered to the plaintiffs herein, and that at no time was the Texas Company ever the owner of

this one-eighth of the oil but under the terms and conditions of the lease The Texas Company agreed to bore for the oil in question and lift the one-eighth of the oil from under the ground and deliver it to the plaintiffs herein on the surface of the ground, free of cost and without any expense whatsoever.

III.

In reply to the fifth paragraph of the first amendment they deny specifically every allegation therein contained and allege that the one-eighth of the oil was not intangible personal property or choses in action, but allege the facts to be that it was minerals belonging to the plaintiffs herein and was taxable in Wichita County, Texas.

IV.

In reply to the second amendment of paragraph No. seven of the complainants bill the defendants deny that the failure and omission of the Commissioners Court and the tax assessor of Wichita County, Texas, to render and assess the taxes against said property herein described was a systematic or intentional act of said defendants, but say the facts are that the property in question was duly rendered by the plaintiffs' agent herein and was duly and legally assessed by the au-
49 thorities of Wichita County, Texas, and deny that in said assessment there was any violation of the laws of Texas or any violation of the laws of the United States and especially the Fourteenth amendment thereof, and specially deny that said acts on the part of the defendants herein in assessing said property as it was assessed denied the complainants herein of any right which they are given under the laws of the state of Texas, or the United States, and the defendants specially deny

that any oil operators or developers, as far as these defendants know, were ever left free, clear or exempt from any portion of the taxes which they were justly entitled to be assessed against them, and specially deny that these complainants have been treated in any other manner or in any other way than all other citizens of Wichita County, Texas, or any other place owning property in Wichita County, Texas.

V.

In reply to the third amendment of the complainants bill in Section No. Seven thereof, and especially to the first paragraph of said amendment, the defendants deny that the rendition by the agent of the complainants was made in compliance with the defendants herein, or any of them, and these defendants specially deny that they ever at any time requested of these plaintiffs, or their agent, to sever the realty from the royalty produced on said land, but on the contrary allege the facts to be that for years previous the plaintiffs, through their agents, had rendered the royalty rights on said property connected with the land in question, but for some unknown reason for the year of 1923, agent of complainants severed the mineral rights from the land and so stated in his rendition that he had reduced all lands to a nominal price of $5.00 per acre on account of the fact that the lands in question were absolutely useless other than for an oil field, and lands that he had formally rendered acreage at approximately $200.00 an acre in the rendition in question, when the acreage was practically the same kind and character, he reduced to $5.00 an acre and then rendered his oil separately by giving it as royalty in so many barrels, and that said act was voluntary on the part of the complainants herein.

VI.

In reply to the second paragraph thereof, that if there was any mistake on the part of the rendition it was made by the complainants' agent herein and as the taxing authorities herein, or the defendants, relying upon the statements and representations of the agent of the complainants herein, they accepted said rendition and but for said acts and said representations on the part of the agent they would have rechecked said properties and revalued said properties and would have had said properties assessed with the mineral rights connected therewith, but on account of the acts and representations of said agent they relied upon same and here and now say that the complainants are estopped to plead that the severance of the mineral rights from the oil lands in question was a mistake on their part, but in fact same was the representations on the part of the complainants herein or their agent, and hence the complainants are estopped from claiming any mistake thereof.

VII.

In reply to the third paragraph of said amendment the defendants say that under the law they had the right to rely upon the representations of the complainants' agent and that they so relied upon same in rendering sa[illegible] property for taxes.

VIII.

In reply to the fourth paragraph of said amendment the defendants specially deny that they refused to accept the rendition so made by the plaintiffs, but on the con-

trary state that they did accept the said rendition insofar as it designated the property but insofar as it went to the valuation of the property in question they increased it to what was the just, reasonable and customary valuation of property in Wichita County, Texas, of like kind and character, and that when they so raised it they specially deny that the plaintiffs, or their said agent, withdrew or attempted to withdraw said rendition from the Commissioners or the defendants herein, or Wichita County, Texas, but on the contrary say the facts are that the representations of the complainants' agent misled and deceived these defendants, as well as the taxing authorities of Wichita County, Texas, with reference to the kind and character of property in question and who owned the same, and especially deny that they severed the property in question or classified the property in question different from that so placed by the plaintiffs, or their agent herein, and but for said classification or severance of said property by the plaintiffs, or their agents, they would have assessed the mineral rights in connection with the respective tract of land and would have gone into said matter more thoroughly, but they relied upon said acts and declarations and representations and renditions of said agent as to the kind and character of the property and the owner thereof, and assessed the property according to the true value at the time in question, and by reason thereof the complainants are estopped to now claim any error in said assessment.

51 IX.

In reply to the fifth and sixth paragraphs of said amendment defendants specially deny that $1,000.00 a barrel for royalty of the kind and character of royalty in question was excessive, and specially deny that there

was any unfair valuation on their part in valuing the royalty at $1,000 a barrel and in valuing the working interest, together with all improvements on said lease at $450.00 a barrel, but say that the royalty of the kind and character in question was worth at least three times as much as the working interest on said lease, together with all the equipment belonging to the lessees thereon, and specially deny that said working interest, together with all the equipment thereon was worth more than 45% of the royalty, that is one barrel of working interest, together with the pro rate part of the equipment on said lease, was not worth as much as 45% of one barrel of royalty, because the working interest was burdened with the operation of said lease, and burdened with the additional taxes for gross production of said lease, and was burdened with looking after said lease, was burdened with boring and exploring for said oil under the terms of said respective leases and lifting the one-eighth of the oil from under the ground, varying from five hundred feet to two thousand feet, and placing it on the surface of the ground, either in tanks furnished by the working interest of said lease, and by reason thereof, in the opinion of the defendants herein, one barrel of royalty was worth at least three barrels of working interest and that there was no unjust or unlawful discrimination on the part of the defendants in valuing the oil known as royalty at $1,000.00 a barrel and valuing the working interest, or lessees interest, taken in consideration with all the personal property of the lessees as working interest on said lease, at $450.00 a barrel.

X.

In reply to the seventh paragraph of said amendment the defendants say that the true place of taxation of said

property is in Wichita County, Texas, as said royalty is an interest in land, or a covenant running with the land when conveyed passes with the land and therefore is taxable where the land is located.

XI.

In reply to the eighth paragraph of said amendment, the defendants say that it is now too late for them to classify said property because they have heretofore classified the same to the plaintiffs herein by their rendition, as is shown by Exhibit "B" to said amendment, and that they are now estopped to have any different
32 classification rendered herein, because if said classification had not been made by the plaintiffs, or the plaintiffs' agent at the time of the rendition of said property, at the time of the valuation of said property and at the time of the assessment of said property the defendants would have gone into said matter more thoroughly would have assessed said property by placing the royalty in connection with the special tract or tracts of land in question, and therefore these plaintiffs are now estopped from saying they are willing to have the property reclassified at this time because they have all ready misled and deceived the defendants herein.

XII.

In further reply to said bill of amendment thereof, which respectfully says that the lessees were to pay 7/8 of the tax and the royalty owner was to pay 1/8 of the tax, these defendants say that they were not aware of this provision in the respective leases at the time of the assessment of the property in question and were not made aware thereof by the rendition of the complainants,

or their agents, as shown by Exhibit "B" attached to this amendment, and if the Court should say that the complainants are only entitled to pay 1/8 of the tax, then the defendants say that they were misled and deceived by the acts and declarations of the agent of the plaintiffs in not informing them of this fact at the time of the rendition and assessment and valuation of said property, and by reason thereof they have allowed the lessees to render their property at what the true value was with reference to the working interest without regard to said 7/8 of the taxes, and said taxes have been paid and that it is now too late to assess said property for said taxes, and by reason thereof the plaintiffs are now estopped to sue upon this act or their private agreement because same was not made known to the defendants herein at the proper time when said property was rendered, valued and assessed for taxation, and having appeared before said Board for the purpose of going into the valuation of said properties and having failed to notify said Board of the true condition of the contracts that he had with his lessees the plaintiffs are now estopped from setting up any private agreement.

XIII.

And further answering herein the defendants say that if there was a private agreement between the lessees and the lessor, or the plaintiffs herein, wherein and whereby the lessees were to pay 7/8 of the increased taxes, that said agreement is a private agreement which the County is not a part of, or any of the defendants a part of, and that said plaintiffs have a right to be compensated from their respective lessees for any additional tax
53 they may have to pay, which under their private agreement they were not supposed to pay, and

therefore these complainants should be relegated to their private agreement with these respective lessees and from them collecting the tax, if any, that they are justly entitled to collect from said lessees.

Wherefore, premises considered, the defendants pray as they have heretofore prayed in their former answer filed herein.

E. L. FULTON,
T. R. BOONE,
E. T. DUFF,
Attorneys for Defendants.

---

54 FINAL DECREE.

Entered Apr. 11, 1924.

Be it remembered that on the 11th day of April, A. D. 1924, came on to be heard the motion of the defendants, B. D. Sartin, County Judge of Wichita County, Texas, H. H. Haynes, J. P. Jackson and L. L. Kuntz, F. R. Knauth, County Commissioners of Wichita County, Texas, Guy C. Raley, Tax Collector of Wichita County, Texas, and Wichita County, Texas, to dismiss the bill of the complainants, W. T. Waggoner and W. T. Waggoner Estate, and the Court after hearing said motion is of the opinion that the law is against said motion and that said motion should be overruled.

It is, therefore, ordered by the Court that said defendants' motion to dismiss the bill of complaint be and it is hereby overruled, to which action of the Court in thus overruling and not sustaining said defendants' motion said defendants excepted.

Thereafter the foregoing cause came on to be heard on its merits, and the Court after hearing the evidence and argument of counsel thereon is of the opinion that the plaintiffs herein are not entitled to prevail and that said defendants are entitled to go hence without day.

It is, therefore, ordered by the Court that the said plaintiffs', W. T. Waggoner and W. T. Waggoner Estate, bill herein be and the same is now hereby dismissed, and that the defendants, B. D. Sartin, County Judge of Wichita County, Texas, H. H. Haynes, J. P. Jackson, L. L. Kuntz, F. R. Knauth, County Commissioners of Wichita County, Texas, Guy C. Raley, Tax Collector of Wichita County, Texas, and Wichita County, Texas, go hence without day.

It is further ordered by the Court however and so decreed that the plaintiffs herein shall recover all costs in this behalf expended by them up to and including the trial of this cause in this Court, and that execution issue accordingly.

It is the further order of this Court and so decreed by the Court that the defendant, Wichita County, shall not be entitled to collect any interest or penalty on the claim for taxes asserted by it against the said plaintiffs herein, or either of them, for the year 1923.

WM. H. ATWELL,
Judge of the U. S. District Court for the Northern District of Texas, Wichita Falls Division.

* * * * * * * *

55 STATEMENT OF TESTIMONY.

Filed June 27, 1924.

Be it remembered, that on the trial of the above entitled and numbered cause, in the District Court of the United States for the Northern District of Texas, at Wichita Falls, April 10th, 1924, the Honorable William H. Atwell, District Judge, presiding, the following was the evidence and all the evidence introduced on the trial of said cause, and the following proceedings were had and taken in connection there with as is herein shown, to-wit:

56 IRVAN DEATON.

My name is Irvan Deaton. I have been in this county over 34 years last December. I am now serving my fourth year as Tax Assessor of Wichita County. As Tax Assessor of Wichita County I have custody or possession of tax renditions made by the tax payers of this county for the tax year 1923. I have the original rendition made by Mr. Moore for W. T. Waggoner in the year 1923; that is, the rendition that came to me. As to the plan followed in getting and accepting those renditions, and as to who held the royalty rights and interests in Wichita County, will say that the price was agreed upon for royalty interest at $1,000 per barrel, $450 on the working interest. The royalty owners paid or rendered as land the oil, or both. In the great majority of cases of lands where royalty holders had interests they rendered their land and give us their production, where we knew the tract of land, the production was on, we added the royalty to the fee. We used the last quarter of the

preceding year as a basis upon which to base our estimates for the current year. We cannot get the first quarter from the comptroller in time to use them for assessing purposes, consequently we adopted the plan of using the last quarter, October, November, and December

57 of the year 1922 as the basis of the assessment for 1923; we took the production of three months and divided it by 92 days in the last quarter. We took than then and added it to the price of the land, the oil lands in question; we figured on a rate of $10 per acre, then added the royalty at the rate of $1,000 per acre to the fee, and the two together made the value of the land. Oil producing lands were given flat land values of $10 per acre, that is speaking of the land as distinguished between that and any other oil interest there might be. Then where it was oil producing land we sought to find out, if it was a royalty owner or producer either, the total production from that land, for a test period, so to speak, of three months of 1922; then having assembled the figures for those three months, namely December, November and October we find a daily average by dividing that sum by 92, the number of days in the three months; we use that as the test period. When we arrived at that it is what we call the daily average; we set that up in our calculations as being the daily production as of January 1st, 1923, the tax date. As to what plant or system we used to arrive at or estimate the producers' property that we taxed, we have what we call form B that we use for leases; on account of that being a long sheet, we mail those out to them, where they did not live in town, and if they live here we

58 leave those sheets with them, and we have a column there that calls for the daily average. So far as the producer is concerned we have a regularly printed form sheet that is made up by the tax

assessor, upon which we seek to get information from the producer as to his property. I have no form with me that you may see except in the book here (indicating). This form that I speak of we designate as form B. We have form A and form B. One of the purposes of the tax assessor and the tax authorities is to get data or information from the tax payer or prospective tax payer of the amount of production that he has on each particular piece of land. We try to find out the amount of producing oil that he has, or probably has, and we endeavor to get it on each tract while we can, but some of them inform us that they cannot give it to us as to each tract separately. The purpose of the tax assessor in 1923 was to get from each man that had oil producing land, whether he was a royalty owner, tax payer, or producer tax payer, date and information as to the amount of oil that his land was producing; we endeavored to show it in barrels too. And the purpose of seeking that information that I have told you about was to enable us to make this calculation,

59 of reducing this finally to money so as to get it on the tax rolls in terms of money. We do that in order to determine the value of the piece of property whether it be royalty or working interest, we class the other as a working interest. The seven-eighths is usually spoken of as producing interest; they vary.

Q. Well, the final result, then is, that your calculation that you make on January 1st, 1923, is to find out, in that way, and by that plan, how much oil that tax payer, whether he be producer or royalty owner, will get throughout the year 1923?

Mr. Boone:

If your Honor please, I do not believe that that is a proper question under the statute of Texas, it is not the

value of the oil that is produced, but it is the value of that right, which it could be sold for on the market on January 1st, of any year.

The Court:

The way counsel on the other side is getting at it, I would not deny him that right to develop as he sees fit, he is cross examining the witness.

A. No, sir; I could not say that,—we do that to find out what his production is the 1st of January, and not what he will get throughout the year; the tax is of January 1st, and we find out what his daily average has been for the last part of the year; we do not know
60 how much he has throughout the year, we do not try to figure that out, that is a little too far, and too much figuring for me. The purpose of the data we assemble is to get a basis upon which to arrive at what a man has as of January 1st.

The Court:

Whether he gets it or not is his business?

A. We do not know whether he is going to get it or not, but we are trying to arrive at what he has as of January 1st, through the year, he might get twice as much as we figure he will get, but if he does that is his good fortune. If we figure 500 daily production, as of January 1st, 1923, and tax him at $500,000 and he comes back to us at the end of the year, the net tax paying time, and shows us that he didn't get but 200,000 we would not adjust it with him. No such adjustment has ever been made by me, and none that I know anything about. I do not know that the Court has ever made any such adjustment. This form B number 1 is the sheet

that we use for leases, like I said awhile ago, we use it for some of our larger fee holders, where the smaller sheet won't take care of the earnings. It will take care of the abstract number, acreage property, or such property that carries acreage interest, whether it
61 is 7/8, or daily production, and carries three columns for values. Sheet 2 or form B is used for listing the personal property that belongs to the lease holders, such as automobiles, drilling rigs, loading racks, pipe lines, refineries, merchandise that they have on their leases, other than regular lease equipment.

After I arrived by calculation I agree on the average daily production as of January 1st, to find the va'ue of the property of the royalty holder I multiply that by $1000; to find the value of the property for taxation purposes of the producer we multiply that daily production by $450.00. We figure $450 on the thousand dollars to represent the royalty. There are other instances in our tax renditions for 1922 where we have called on the holders of royalty to furnish us the amount of their production; we asked all of them to do that, to give us the production in barrels. I can recall two or three or four or five instances in which they gave that information in practically the same form that was given by Mr. Moore in his rendition. As you request, I turn to one that is illustrative; it is one, a rendition made by Kemp & Kempner and it sets out a number of tracts of land; we will say more than 10 tracts, each tract having a value assigned to it, and then at the bottom it says,
62 to quote from it, "Royalty, 59-28/100 barrels, at $1,000.00, $59,280.00; that is exactly the same form as the one Mr. Moore made Mr. Waggoner's rendition on. There are within my own recollection a number of instances where those renditions came in in just the shape of that rendition of Kemp & Kempner; I could

not say how many others there were; I could not estimate the number of others. I can call to mind this one and one of Mr. Douglass' at Electra and there are some others, but I forget them just now. No, sir; that was not all the information that we would seek from those who had land that were oil producing lands; we had to get at it in different ways; anyway we could get at it; some of them refused to render any, and I had to go and take the leases and estimate it as best I could, the number of barrels of royalty they had. We tried to get them to furnish us with this information and if they refused or would not furnish the information of course they forced me to guess at it and I always tried to guess high enough, I did not want to under guess it. If all the leases in that particular tract of land were rendered we could check that up and get the data upon which to figure the royalty interest from working interest; some of them would have 7/8 interest another fellow would have 7/10, another 5/8, and maybe 14/16; they would have various
63 interests, some of them would have 19/32; you can see that it would be very hard to figure out that stuff, but I resorted to that where I couldn't get it otherwise. I resorted to the records at Austin, Texas, where they report their production for taxation; I tried to keep posted as to that so as to get this data. In about 90 per cent. of the cases the royalty owner furnishes me that data as to daily production; some of them furnish it in the way of letters written to me; if they didn't give me any information at all I would write them back and tell them they did not render royalty for the three months, October, November and December; in giving their production some give it one way and some another. We prefer to have the production on each tract separate, but cannot always get it that way. Mr. Douglass when he brought his rendition down he made it up and brought

it to me. I asked him for his production on each individual tract and he says: "I can't give it to you", he says, "I have my stuff surveyed off, one man owns a lease, one in one tract and part in another", he says, "That is my production there, 1/8 royalty. No, Mr. Waggoner's rendition is not the only one in which I rendered the royalty rights and interests as I figured them, as personal property. There is another instance right
64 here, this one of Kemp & Kempner, I just show it on there as a personal item. Other instances are, Mr. Douglass' was the same; Mr. Stringer paid the same way, and if I could look through I could find quite a few. There was just a small per cent of the royalty owners whose royalty had been rendered as personal property; it would be more than I per cent and less than five per cent I think. The reason why the royalty rights and interests of that small number, 5 percent, say, were rendered as personal property, whereas 95 per cent was rendered as realty interests, was because that was the way the information was furnished. The Kemp & Kempner is rendered that way; unless I knew the lands I could not apportion it; I might charge them up with royalty on land that didn't have a barrel of production on it. The rendition of the oil, the daily production is figured as of January 1st, that was rendered as personal property, because I was unable to assign that oil, or the money arising from the calculation, to any particular lands. Now in Mr. Waggoner's case, I knew that he has, or I believed he had oil on three pieces of land, last year he had quite a lot of new production, I do not know just what land the production was on, and
65 neither did the Court, so consequently we had to handle it as it came in. I might have tried to prorate it, I might have charged up on production the land that didn't have a bit of oil on it. For the purpose

of illustration, C. T. Taylor is the name of another royalty holder in the county other than Mr. Waggoner. There is a bunch of producers on the C. T. Taylor land; 96, 97 and 98 Red River Valley lands.

Q. Let's take this sort of a case: A owns 100 acres of land, and he made a lease to B, and B drilled the land, he has 10 wells on the land, and A had 1/8 royalty, B had 7/8 working interest, on January 1st, 1923, A's daily production was 100 barrels, and of course B's daily production, you would take it and it would be 7 times that wouldn't it?

A. Yes, sir; if 7/8 was seven hundred it would follow that one-eighth would be 100 barrels. I would take the producer's report and rendition of his daily production against the royalty holders' rendition and production; if one party holds the lease it would be very easy.

Q. I am just assuming a case, now then,—A renders his 100 barrels, and you know what land it belongs to; B the lessee renders his 700 barrels; you know what land it belongs to; now in A's rendition, of course, he puts in that land as property belonging to him, and he puts on his rendition his 100 barrels daily production; then you would take his land at $10 and you multiply his 100 barrels by $1,000.00 and his lease, his rendition would be $100,400.00?

66

A. Yes, sir; that is the way we try to do. You ask me what I would do with B if he reported to me his 700 barrels, what I would put on the rolls and set up against him as his tax obligation for that year. We have A's rendition, that would go on our fee book, and B's rendition would go on our lease book, 1/8 belonging to A, 7/8 working interest belonging to B, 7/8 at $450, A at one thousand per barrel, the difference between the price of the royalty and the working interest; but we abstract our fee on one set of books, and our lease on an entirely

different set of books. I do not have the lease books up here so you can examine it; it is down in the vaults. There is a partial description of the land on which the lease is. It gives the block number if it is carried out of the subdivision, we carry it as block number so and so, Red River Valley Land; if it comes out of the abstract we carry the abstract number and the original grantee.

Q. Now then, suppose B has 20 wells that are making his daily production; suppose it is a 2,000 foot sand, he would have casing in each one, would he, the ordinary equipment?

67 A. Yes, sir. Ordinarily he would not have but one string of casing; practically all the drilling in this county is done with a rotary rig, only one string of casing. The value of one string of casing 2000 feet would depend on the size. Some of I think is 6 and 5/8; I suppose that is the size most of them use. That size casing would cost somewhere in the neighborhood of $1.50 per foot, I think.

Mr. Boone:

To keep the record straight, I think I will object, unless he is shown to be qualified to give the value of the casing.

Mr. Barwise:

I think we all know pretty well.

The Court:

I imagine it is pretty well known, isn't it, or not?

The Court:

Don't you assess it right along?

A. No, sir; that is part of the lease equipment, we do not assess it.

Mr. Barwise:
That is the point I am getting to.

Mr. Boone:
That casing has not been but about $1.10 or $1.16 in the last year or two.

A. You take the casing 6-5/8 might not cost more than that; now I know it was higher than that.

The Court:
Suppose a casing is out here on the yard and
68 you assess it? You know what it is worth?

A. Yes, sir, we assess that, but it is rendered as merchandise by these supply houses, they give us their inventory on the merchandise, we do not assess it by the foot. Of course, they figure it that way, but we do not know how many feet they have.

The Court:
In order to avoid a technical objection,—

Mr. Boone:
New casing was about $1.50 or $1.60, but casing in a hole is worth about 40 cts; you can never pull more than about one-half of it, or two-thirds of it, and get about 80 or 85 cents, for it after it is pulled.

Mr. Barwise:
I am now trying to make the point that it is of substantial value.

B will probably have a number of engines on that lease; he might and he might not have. He would have water pipe lines. In addition to his casing he will have a two inch tube or pipe line clear to the bottom of his well to pump his oil out of, or probably a 3 inch tube. And they frequently have gathering lines on the lease to bring the oil in to the storage tank, but gathering lines are not counted as part of the lease equipment. Not all the equipment on the lease is counted as lease equipment. We only count in the lease equipment the equipment that is absolutely necessary for the operation of
69 the well, and you take the flow lines in the small tanks they pump the oil into, and the rigs, etc., we count as lease equipment, the other we do not count as lease equipment. The storage tanks are in addition to the lease equipment. The flow tanks are counted as lease equipment. They have them on the lease; they have to have them. The cost of these tanks depends upon the material they are made out of; these 55,000 barrel tanks, they cost about $16,000 or $18,000. You ask me if that character of property, such as you have indicated, casing, tubing, through which the oil is pumped, the engine, the tanks, and all property such as that that is used in connection with the producing of oil, doesn't go on my tax rolls at all as separate personal property. In answer to that will say that the part that we consider as regular lease equipment, for the operation of the well and not the storage tanks, that is not counted as lease equipment, we figure that in at $450.00. That property that you have described is figured in. The part that is included with the lease equipment is not described on our tax rolls. That part of the property that I speak of, part of the lease equipment, that does not go on the tax rolls, if that is paid on at all, it is be-

cause it is included in a calculation whereby we
70 charge $450.00 per barrel for the oil; that is counted as part of the lease equipment and it is figured that way. I do not know whether there was on the first of January, 1923, as much as one-half million dollars worth of that character of property in the county used in connection with leases; I don't know just how much there was, but then personal property, on this list, I think we have four or five million dollars worth of personal property on the leases in addition to the lease equipment on the tax rolls. I could not give you an estimate of the amount of that property. You ask me if I know whether there were any instances of anybody ever paying on any different basis of royalty or production, than the ones I have indicated. They were all figured on the same basis. In answer to your question as to whether they did not finally put them on the rolls on that basis, and charge them on that basis, will say, Yes, they are charged for on the rolls that way.

Cross Examination.

By Mr. Boone:

Other royalty owners in Wichita County were valued at the same rate and in the same way that we valued the Waggoner estate property. We figured them at $1000 per barrel, all of them. All those leasehold estates were valued on the same basis, $450.00, including the equipment necessary to operate the well; they were
71 all figured on the same basis. It is true that I stated to Mr. Barwise that in my tax rolls that these necessary essential properties on the leases were not described in my books, on our tax rolls, like the casing in the well, rods and the tubing, flow lines, etc., were not described. We handled it the same way we handle

a house and lot, just value the lot and not mention the house; we use it as a matter of simplifying things. We found out, after I was in the office, that this stuff was all sold on a production basis; when I went in there they figured so much on the well per foot, we changed the plan and figured so much per barrel, with the necessary equipment for the operation of the lease thrown in that value.

Prior to the time of assessment the Commissioner's Court of Wichita County, Texas, called in the oil men for the purpose of familiarizing themselves with the values of oil and gas leases in Wichita County, Texas; that was early in January last year, 1923. I suppose there were between 50 and 75 people, oil people, here that day in that conference with me and the Commissioner's Court. We were down in the country court at law room, down stairs. In January, 1923, I took and heard evidence with reference to the market value of oil and gas leases, with the equipment necessary to
72 operate the same at that time, January 1st; the purpose of the meeting was to arrive at a value on which to base the work for 1923. It is my recollection that at that time I took and heard evidence upon what was the market value of royalty interest on January 1st, 1923; of course there was quite a lot taken place there; I was not in the room all the time myself.

The 55,000 barrel tank that I mentioned as being on the leases sometimes is classed as necessary essential equipment, working interest. They usually have small size tanks, just small flow tanks; I do not suppose any of them possibly run over 500 barrels, are small tanks. Some of them run as low as 50 to 100 barrels. I could not say that I did request Mr. Waggoner to give me a list of his property and the production, we just sent a blank to render his property on. This is the blank (in-

dicating) that I sent to render the property on, exhibit No. 1, the blank that I sent for the purpose of rendering his property. I am not sure when it was returned to our office, if it was ever returned. Mr. More dated it the 1st day of May, they came in after the 1st day of May, 1923, it shows to have been signed here on the 1st day of May. It was sworn to by Mr. More; it was a little late getting in, I remember that, it was supposed to have been by April 30th; it came in after
73 that time. April 30th is the statutory time, January 1st to April 30th, and it came in after that time. Now on exhibit 1 here there is some typewriting, giving the abstract number, lot number, block number, and the original survey number, and the acres, and the number of wells, depth, and then the daily production in barrels, and then the total value; now the typewriting, the portion that is typewriten was in there when it was returned to our office by Mr. More.

Mr. Barwise:

Plaintiffs offer in evidence Exhibit "1".

(Exhibit "1" reading as follows):

See page 23.

74 Those blanks were printed for the purpose of rendering oil properties. We used them for the larger land owners, in both acreage and city property, as it carried the lot and block, and abstract, etc Take in this, for instance, first survey of abstract number 13, in the Bradley, acres 293, the value we put upon the royalty was $325,350.

Mr. Barwise:

We have no objection to that, except of course that the document should speak for itself.

The Court:
Yes, it is in evidence.

Mr. Boone:
It is not in typewriting, I want to prove that that particular item was down there when he got it. That item of three hundred twenty-five thousand dollars, plus, in the instrument,—this three hundred twenty-five thousand and three hundred fifty was filled in with the pen, and all the other typewriting was on there when it arrived at our office.

The Court:
That pencil notations, they were not in there when they arrived at your office?

A. No, sir.

The Court:
But all the typewriting, and the amount in pen and ink was on there when it came to your office?

A. Yes, sir.

75 Mr. Boone:
We offer this instrument in evidence as identified by the witness: (Ex. No. 1.)

Form B.

Inventory of Property Owned by W. T. Waggoner of Ft. Worth, Texas, and rendered for Assessment of Taxes for the year 1923 by R. L. More, of Vernon, Texas, to Tax Assessor of Wichita County, Texas.

Abst. No.	Lot	Blk	Original Grantee or Survey	Acres	Total Value
13			J. Bradley	293	1465
553			F. J. Cook	33	165
455			A. Gibson	1280	6400
533			S. Holloway	287	2583
803			M. M. McLauren	38	190
393			Seale & Morris	647	3235
535			Seale & Morris	453	2265
531	Sec. 1		G. C. & S. F. Ry.	300	2700
731	2		G. C. & S. F. Ry.	297	695
530	3		G. C. & S. F. Ry.	171	1540
738	4		G. C. & S. F. Ry.	159	1431
586	18		G. C. & S. F. Ry.	488	2440
606	20		G. C. & S. F. Ry.	225	2025
137	13		H. T. & B. R. R. Co.	640	3200
505	14		H. T. & B. R. R. Co.	384	1920
716	22	5	H. & T. C. Ry.	76	380
110	23	5	H. & T. C. Ry.	300	1500
	771	Sec. 26	5 H. & T. C. Ry.	640	3200
76	109	27	5 H. & T. C. Ry.	646	3230
	761	28	5 H. & T. C. Ry.	476	2380
790	30	5	H. & T. C. Ry.	9	45
788	30	5	H. & T. C. Ry.	40	200
106	31	5	H. & T. C. Ry.	611	3055
108	33	5	H. & T. C. Ry.	618	3090
482	34	5	H. & T. C. Ry.	640	3200
105	35	5	H. & T. C. Ry.	650	3250
392	5	7	H. & T. C. Ry.	354	3185
800	6	7	H. & T. C. Ry.	250	2250
688	6	13	H. & T. C. Ry.	8	75
122	147	14	H. & T. C. Ry.	95	855
784	148	14	H. & T .C. Ry.	640	3200
569	1		Texas Central Ry.	141	7000
632	2		Texas Central Ry.	68	610

Total number of producing wells 143 Royalty 723.

Cattle	12 (milch pen)	300
Horses	6	300
2 Wagons & Autos 3	5	2000
Tools & Implements		2000

All lands hereon reduced to $5.00 per acre is absolutely useless other than for oil field; fences down, roads in every direction and we are leasing the surface
77 for open grazing at about 10c per acre.

78 Q. Did you give him notice to appear before the equalization board to show cause why his values should not be raised to $1,000 per barrel?

The Court:
I think that is plead and admitted.

He appeared before me; I did not hear him say anything about wanting to withdraw that rendition. I was not in the room all the time however, but I never heard anything said about it.

The Court:
Is this controverted, that amount?

Mr. Barwise:
The amount?

The Court:
That would be due on that?

Mr. Barwise:

Well, of course, we tender that amount, they raise that amount to about twice that, they raise it to seven hundred some odd thousand.

The Court:

In your pleading you do tender the amount?

Mr. Barwise:

We did make a tender, I do not know just what is in the pleading about it, we had rather have paid that than to have had a lawsuit, I do not know just how it stands.

Mr. Boone:

He says that, after making the rendition he came before the board and sought to withdraw it, to keep from being bound by the plea of estoppel.

This Exhibit No. "2" that you hand me, marked for identification is Mr. Waggoner's rendition for the year 1922, the typewritten portion; it is just
79 like the other, typewritten on one of my forms; rendered by R. L. More, and I think sworn to by him.

Mr. Boone:

We offer this instrument in evidence:

(Exhibit "2", reading as follows):

Mr. Barwise:

We have no objection.

80 Inventory of Property Owned by W. T. Waggoner and Rendered for Assessment of Taxes for the year 1922 to the Tax Assessor of Wichita County, Texas.

Abst.	Sec.	Blk.	Cert.	Grantee	Acres	Value
13			20/87	J. Bradley	293	$3140
553			25/61	F. J. Cook	33	330
455				A. Gibson	1280	$16800
533				S. Holloway	287	$2870
803	3			M. M. McLauren	38	$3800
393	1		30	Seale & Morris	647	$6470
535	2		30	Do	453	$4530
531	1		5196	G. C. & S. F. R. R.	300	$3000
731	2		5196	"	297	$2970
530	3		2592	"	171	$1710
738	4		2592	"	159	$1590
586	18			"	488	
606	20		1/168	"	225	
137	13			H. T. & B. R. R.	640	$6400
505	14			H. T. & B. R. R.	384	$3840
716	22	5		H. & T. C. Ry. Co.	76	$ 760
110	23	5		"	300	$3000
771	26	5	740	"	640	$6400
109	27	5		"	646	$6460

81

761	28	5		H. & T. C. Ry. Co.	476	$4760
790	30	5	742	"	9	$ 90
788	30	5	742	"	40	$ 400
106	31	5		"	611	$6110
108	33	5	744	"	618	$6180
482	34	5	744	"	640	$6400

Abst.	Sec.	Blk.	Cert.	Grantee	Acres	Value
105	35	5	745	"	650	$6500
392	5	7	1141	"	354	$3540
800	6	7	1141	"	250	$2500
688	6	13	32/2916	"	8	$ 80
122	147	14		"	95	$ 950
784	148		31/2635	"	640	$6400
569	1		1231	Texas Central Ry.	141	$28000
632	2		1231	"	68	$ 680
All of Blk. 95 Original Town of Electra, Texas						$3000

Cattle	400	$8000
Horses & Mules	40	$2000
Hogs	20	$ 200
Wagons & Vehicles	5	200
Autos & Trucks	2	$1500
Tools & Impl.		$1000
Telephone Line		$100

82 The State of Texas,
County of Wilbarger:

I, R. L. More, do solemnly swear that the above and foregoing inventory rendered by me, contains a full, true and complete list of all the property owned, or held by me in my name for W. T. Waggoner, in Wichita County, Texas, and personal property not in said county properly taxable therein under the laws of this state, on the first day of Jan., 1922, and that I have true answers made to all questions propounded to me touching the same, so help me God.

R. L. MORE.

Sworn to and subscribed before me this 24th day of Apr., 1922.

G. M. ALLMAN.

(Seal) Notary Public, Wilbarger County, Texas.

83 This exhibit "3" is Mr. Waggoner's rendition for the year 1921, rendered and sworn to by R. L. More. The typewritten portion was his valuation.

Exhibit number "4" is Mr. Waggoner's rendition for the year 1920, typewritten just like the others.

This Exhibit #6 is Mr. Waggoner's rendition for the year 1919, typewritten and rendered by Mr. More.

Mr. Boone:

Just the typewriting is all I am offering

84 DEFENDANT'S EXHIBIT NO. 3.

Inventory of Property Owned by W. T. Waggoner and Rendered for Assessment of Taxes for the Year 1921, to the Tax Assessor of Wichita County, Texas.

Abst.	Sec.	Blk.	Grantee	Cert.	Acres	Value Dist.
13			J. Bradley	20/87	293	$3140
553			F. J. Cook	25/61	33	$ 330
455			A. Gibson		1280	$12800
533			S. Holloway		287	2870
624	3		M. M. McLauren		38	3800
393	1		Seale & Morris		647	6470
535	2		"		453	4530
531	1		G. C. & S. F. Ry.	5196	300	3000

Abst.	Sec.	Blk.	Grantee	Cert.	Acres	Value	Dist.
731	2		"	5196	297	$2340	
530	3		"	2592	171	$1710	
738	4		"	2592	159	$1590	
586	18		"	4/688	488	$97600	
606	20		"	1/168	225	$22500	
137	13		H. T. & B. R. R.		640	$6400	
505	14		"		384	$3480	
716	22	5	H. & T. C. Ry.		76	$ 760	
110	23	5	"		306	$3000	
771	26	5	"		640	$6400	
109	27	5	"		646	$6400	
761	28	5	"		476	$4760	
85							
790	30	5	H. & T. C. Ry. Co.	742	9	90	
788	30	5	"	742	40	400	
106	31	5	"		611	6110	
108	33	5	"	744	618	6180	
482	34	5	"	744	640	$6400	
105	35	5	"	745	650	$6400	
392	5	7	"	1141	354	$3450	
800	6	7	"	1141	250	$2500	
688	6	13	"	32/2916	8	80	
	147	14	"	31/2635	95	950	
784	148	14	"	31/2635	640	$6400	
569	1		Texas Central	1231	141	$18200	
632	2		"	1231	68	680	
All of Block No. 95, Town of Electra, Texas						$1500	

Cattle	400	$7000
Horses	30	1500
Hogs	10	200
Wagons, Autos, Trucks, etc.	8	2000
Tools, Impl. & Mch.		1000
Phone Line, 2 miles		35

86 The State of Texas,
County of Wilbarger:

I, R. L. More, do solemnly swear that the above and foregoing list rendered by me contains a full, true and complete inventory of all the property owned, or held by me in my name, for W. T. Waggoner in Wichita County, Texas, and personal property not in said county taxable therein under the laws of this state on the 1st of January, 1921, and that I have true answers made to all questions propounded to me touching the same, so help me God.

R. L. MORE.

Subscribed and sworn to before me, this 14th day of Apr., 1921.

G. M. ALLMAN,
(Seal) Notary Public, Wilbarger
County, Texas.

87 DEFENDANT'S EXHIBIT NO. 4.

Inventory of Property Owned by W. T. Waggoner and Rendered for Taxation for the Year 1920 to Tax Assessor of Wichita County, Texas.

Abst.	Sec.	Blk.	Cert.	Grantee	Acres	Value S. D.
13			20/87	J. Bradley	293	3140
553			25/61	F. J. Cook	33	260
455				A. Gibson Survey	1280	10240
533				S. Holloway	287	2290
624				M. M. McLauren	38	3800
393	1		30	Seale & Morris	647	5170
535	2		30	"	453	2620
531	1		1596	G. C. & S. F.	300	2400
731	2		1596	"	234	1870
530	3		2592	"	171	1360
738	4		2592	"	159	1270
586	18			"	488	97600
606	20		1/168	"	225	45000
137	13			H. T. & B.	640	5120
505	14			"	384	3840
716	22	5		H. & T. C. Ry. Co.	76	600
110	23	5		"	300	2400
771	26	5	740	"	640	5120
109	27	5		"	640	5120
761	28	5		"	476	3420

88

790	30	5	742	H. & T. C. Ry. Co.	9	70
788	30	5	742	"	40	320
106	31	5		"	611	4890
108	33	5	744	"	618	4920

Abst.	Sec.	Blk.	Cert.	Grantee	Acres	Value S. D.
482	34	5	744	"	640	5120
105	35	5		"	640	5200
392	5	7	1141	"	354	2820
800	6	7	1141	"	250	2000
688	6	13	32/2916	"	8	60
	147	14		"	95	760
784	148	14	31/4625	"	640	5120
569	1		1231	T. C. Ry. Co.	141	18200
632	2		1231	"	68	450
All of Block #95, Town of Electra						1500

Cattle	400	9000
Horses and mules	40	1600
Hogs	20	200
Wagons and Vehicles		200
Autos and Trucks	7	2000
Tools, Implements and Mchy.		1000
Phone Line		150
		14.150

89 State of Texas,
County of Wilbarger:

I, R. L. More, do solemnly swear that the above and foregoing list rendered by me contains a full, true and complete inventory of all the property owned or held by me in my name for W. T. Waggoner in Wichita County, Texas, and personal property not in said county taxable therein under the laws of this state on January 1st, 1920,

and that I have true answers made to all questions propounded to me touching the same, so help me God.

R. L. MORE.

Sworn to and subscribed before me this 26th day of April, 1920.

(Can't decipher name.)
Notary Public, Wilbarger
County, Texas.

90 DEFENDANT'S EXHIBIT NO. 6.

Inventory of Property Owned by W. T. Waggoner and Rendered for Assessment of Taxes for the 1919 by R. L. More, to the Tax Assessor, of Wichita County.

Abst.	Sec.	Blk.	Grantee	Acres	Value	Dist.
13			J. Bradley	293	$2340	
553			F. J. Cook	33	$ 250	
455			A. Gibson	1280	$10240	
533			S. Holloway	287	$2290	
624			M. M. McLauren	38	$3800	
393	1		Seale & Morris	647	$5170	
535	2		Seale & Morris	453	$3620	
531	1		G. C. & S. F. Ry. Co.	300	$2400	
731	2		"	234	$1870	
530	3		"	171	$1360	
738	4		"	159	$1270	
586	18		"	488	$48800.00	
606	20		"	225	$22500	
137	13		H. T. & B. R. R. Co.	640	$5120	
505	14		"	384	$3840	

Abst.	Sec.	Blk.	Grantee	Acres	Value	Dist.
716	22	5	H. & T. C. Ry. Co.	76	$ 600	
110	23	5	"	300	$2400	
771	26	5	"	640	$5120	
109	27	5	"	640	$5120	

91

761	28	5	H. & T. C. Ry. Co.	476	$3420	
790	N½ 30	5	"	9	$ 70	
788	8½ 30	5	"	40	$ 320	
106	31	5	"	611	$4890	
108	33	5	"	618	$4900	
482	34	5	"	640	$5120	
105	35	5	"	650	$5200	
392	5	7	"	354	$2820	
800	6	7	"	250	$2000	
688	6	13	"	8	$ 60	
	147	14	"	95	$ 760	
784	148	14	"	640	$5120	
569	1		Texas Central Ry. Co.	141	$14100	
632	2		"	68	$ 450	
Lot 1, Blk. 23, Electra, Texas					50	
All of Blk. 95, Town of Electra					$1500	
Cattle				400	$9000	
Horses & Mules				40	$1600	
Hogs				20	$ 300	
Wagons, etc.				5	$ 200	
Autos & Vehicles				5	$2000	
Tools, Impls. & Mch.					$1000	
Phone Line					$ 35	

92 The State of Texas,
County of Wilbarger:

I, R. L. More, do solemnly swear that the above and foregoing list of property contains a full, true and complete list of all the property owned, or held by me in my name, for W. T. Waggoner, in Wichita County, and all personal property not in said county taxable there under the laws of this state, on the 1st day of Jany., 1919, and that I have true answers made to all questions propounded to me touching the same so help me God.

R. L. MORE.

Sworn to and subscribed before me this Apr. 26, 1919.

S. C. HOGSETT,
(Seal) Notary Public, Wilbarger County, Texas.

93 Exhibit number "5," survey number 586, abstract 586, shows a value as rendered by him in 1920 at $97,600. Exhibit "6," abstract 586 was rendered by him at $48,800.00; that was for 1919. It was raised by the Court to $97,600.

Mr. Barwise:

I do not know whether that is material or not, it may be, but if it is not I do not like to see it go in the record.

The Court:

He pleads these values, I do not know just what force they will have.

Mr. Boone:
It is plead on the ground of estoppel.

The Court:
I will allow it in.

Exhibit number "3", survey 586, showing tax for 1921, that is rendered for $97,600.

As to exhibit number "2," survey 586, for the year 1922, it came into my office blank, we checked it up as best we could, and found that he had better than 84 barrels royalty, we prorated that among the three pieces here that was left blank; rendered it at $1,000 per barrel. The value of that survey is $87,840.00. This (indicating) is exhibit number "1," the rendition in controversy, and he rendered that same survey in 1923 at $2440.00. The value put upon the surveys of land by the Court, by the equalization board was $3900.00. I think there were 488 acres in that survey. At the hour and day that I received that rendition I did not know
94 the amount of production of royalty on that tract at that time. At the time Mr. More sent me that rendition he did not give any other information other than the statement on the bottom of his rendition, known as exhibit "1"; that was all I got. When he appeared before the Commissioners' Court and the board of equalization he did not give me any other information concerning the number of barrels of royalty, or upon what tract or tracts it was situated. I have been asked to determine if I could, the value or amount of production that a person would receive from royalty for the incoming year, but it is not possible to do that accurately.

I know in a general way the location of the Waggoner lands in the oil fields. I do not know whether the Waggoner lands have wells upon them located in closer proximity to each other than the other oil pools in Wichita County. As to whether they are further apart and cover more territory than the average oil pools in Wichita County, will say it is not drilled as close as in the northwest field. The effect that this would have upon the value of the royalty, in drilling them farther part, would naturally be longer life; it would naturally sell for a little more money than it would where they were drilled closer. As to whether there was very much territory undeveloped in the Waggoner land, lying between the wells, on January 1st, 1923, I do not know as I could speak definitely
95 about that, but there was quite a lot of new production coming in up in that part of the country along in that time. Of course, I was not right out in the field, I know just from the location on the map and other large interests, and location of the property. You cannot take royalty oil producing properties in general and tell how much oil is going to be produced for the incoming year, irrespective of whether or not new wells are drilled; you could not do that. Taking the same illustration Mr. Barwise used, if new wells are drilled in during 1923 the production might be doubled, or even four times as much, whereas if no new wells were drilled it necessarily would decline to some extent; they generally do, however, there are some exceptions to the rule. My records show that Waggoner had production back as far as 1911. The records show that from that particular tract it is still producing, and was producing in 1923; was producing for a period of twelve years.

Q. Mr. Barwise ask you if people had come to you and asked you to reduce the taxes because they did not make as much production throughout the entire year as they showed to have had on January 1st, of that year, now did Mr. More come to you and make that statement at any time?

A. Yes, sir.

Q. Or ask you to cut down on that amount?

A. He hasn't said anything to me about it at all.

96 Re-Direct Examination.

By Mr. Barwise:

This meeting of oil men that I have spoken of was composed of producers and royalty owners. As to who called or started the meeting, I took it up with the Commissioners' Court, and I mailed the cards out to those oil operators myself. On the tax renditions I have introduced in evidence here, for several years prior to 1923, I proceeded on the idea of taxing the lands, taking into consideration the oil rights and interests in the lands in arriving at the values of the lands, without reporting or giving anything of the production. The fact of the business is, I don't think anybody ever asked anything about the production until since I have been in office. I don't know who originated this plan of using this daily production theory; it was originated, as far as this county was concerned, through the tax assessor's office here, and with the Commissioners' Court. I think I first suggested it. I don't think Wichita County was the only county that adopted that plan; I think others are using the plan. I think probably they began using it since we have. I think I am the one who started that plan, I wouldn't be positive about it.

97 The Court:

Is this the county taxes, or the county, state and school?

Mr. Boone:

It is the county, state and school.

So far as I know the meeting didn't break up with trouble between the royalty holders and the producers; there was some objection by some of the royalty holders, however, but, then if there was any discord about it I never heard anything about it. There was not any more dissatisfaction among the royalty holders than there was about the producers. On these tax renditions reaching back over several years that have been identified and introduced in evidence there are a lot of pencil figures, these were not placed there by Mr. More; his figures are all in typewriting. It was merely typewritten and the printed part, except 1923, the price on that royalty in 1923 was filled in in pen and ink, that was his figures and not ours.

Mr. Barwise:

We offer in evidence the Kemp & Kempner rendition (reading as follows:)

98 Mr. Barwise:

Also offer in evidence Form B, marked Exhibit "2," reading as follows:

Withdrawn—See Page 47.

99 That form was not in use in January, 1923; that is a little different form, there is a little

difference in the two, I will furnish you an identical copy of the other. This carries some information the other one did not carry.

Mr. Barwise:

We withdraw that exhibit "2."

Mr. Barwise:

We introduce in evidence, form B., on sheet number 2, marked Plaintiffs' Exhibit "3," and reading as follows:

Number.	School District No.	Owner's Value	Assessor's Value	Raised To.
Automobiles, Make,				
Automobiles, Make,				
Automobiles, Make,				
Automobiles, Make,				
Automobiles, Make,				
Boilers,				
Buggies,				
Cables,				
Cashing, Oilwell, size in inches,				
Cashing, Oilwell, size in inches,				
Cashing, Oilwell, size in inches,				
Cashing, Oilwell, size in inches,				
Cashing, Oilwell, size in inches,				

Number.	School District No. ..	Owner's Value	Assessor's Value	Raised To.
	Derricks,			
100	Derricks,			
	Drilling Riggs,			
	Engins, Steam,			
	Engins, Gasoline,			
	Filling stations			
	Filling stations			
	Filling station stock,			
	Gasoline on hand January First.			
	Gasoline Plants No. .... Unites each,			
	Gasoline Plants No. .... Unites each,			
	Gasoline Plants No. .... Unites each,			
	Horses and Mules			
	Room Houses			
	Room Houses			
	Room Houses			
	Room Houses			
	Loading Racks,			
	Manufacturing tools,			
	Office Equipment			
	Oils, Crude, No. .... Bbls. On hand Jany. first,			
	Oils, Lubricate. Bbls. on hand Jany. first,			
	Pipe Line.			
	Miles 2 in. Oil pipe			
101	Miles 3 Oil pipe			
	Miles 4 Oil pipe			
	Miles 6 Oil pipe			
	Miles 8 Oil pipe			
	Miles 10 Oil pipe			
	Miles 12 Oil pipe			

Number.	School District No.	Owner's Value	Assessor's Value	Raised To.
	Miles 1 In water pipe			
	Miles 2 water pipe			
	Miles 3 water pipe			
	Miles 4 water pipe			
	Miles 6 water pipe			
	Pumping Station, Oil,			
	Pumping Station, Oil,			
	Pumping Station, Oil,			
	Pumping Station Water,			
	Pumping Station Water,			
	Pumping Riggs,			
	Pumping Jacks,			
	Refineries, Machinery, Equipment,			
	Refineries Daily Capacity in Bbls.			
	Shops and Equipment,			
	Tank Cars,			
	Tank Cars Leased			
	Barrel tanks,			
	Barrel tanks,			
	Tankage not otherwise listed			
102	Tools not otherwise listed			
	Tractors, tonnage,			
	Trucks, tonnage,			
	Miles of Telegraph and Telephone lines,			
	Wagons and Harness,			
	Warehouses & Merchandise in each,			
	Warehouses & Merchandise in each,			
	Miscellaneous property not otherwise listed,			
	Miscellaneous property not otherwise listed,			

The State of Texas,
County of .....:

I, ..., do solemnly swear (or affirm) that the above inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me in my name for..... ..... in Wichita County, and personal property not in this County subject to taxation in this County by the laws of this State, on the first day of January, A. D. 192... and that I have true answers made to all questions propounded to me touching the same, so help me God.

.....

Subscribed and sworn to before me this .... day of ...., 192....

....., Tax Assessor.

By ....., Deputy Tax Assessor, Wichita Co.

103 Mr. Boone:

Both in force.

A. Yes, sir, there is no change, this is for personal property.

Mr. Barwise:

We offer in evidence Exhibit 4, which is a copy of an oil and gas lease, reading as follows:

Exhibit 4—Lease, W. T. Waggoner to Texhoma Oil & Refining Co., Feb. 10, 1922, omitted, being heretofore copied at page 30.

* * * * * * * *

108 Mr. Barwise:

We next offer in evidence, Exhibits "5" and "6."

Exhibit number "5" being the same form as exhibit number "4" on pages 51 to 55 of this record, with the following exceptions:

Dated, February 17th, 1922.

C. H. Clark, of Wichita Falls, Texas, Lessee.

Consideration, $8,400.00.

Being 42 acres out of the A. Gibson survey, patent No. 620, Vol. 4, as follows:

Beginning at a stake in the center of the road, the S. E. corner of survey No. 1, Seale & Morris; thence west, with the S. line of said Seale & Harris survey, 2640 feet a stake; thence south 700 feet a stake; thence east 2640 feet a stake; thence north 700 feet to the place of beginning.

Acknowledgment: taken 7th day of February, 1922.

Exhibit number "6" reading as follows:

109 Exhibit 6—Lease, W. T. Waggoner to T. G. Lomax, Nov. 22, 1922.—omitted, being heretofore copied at page 37.

* * * * * * * *

113 The State of Texas,
County of Wilbarger:

Before me, G. M. Allman, a Notary Public, within and for the State and County aforesaid on this day personally appeared R. L. More, agent and attorney in fact for W. T. Waggoner, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and official seal this 26th day of Nov., 1922.

....., Notary Public in and for Wilbarger County, Texas.

114 Mr. Barwise:

Plaintiffs offer in evidence the following exhibits, numbered and reading as follows:

Exhibit Number "7," being the same form as exhibit number "6," copied on pages 56 to 61 of this record, with the following exceptions:

Date, December 22nd, 1921;

The Kentucky Production Company, Lessee;

40 acres, being 475 vrs. sqr. out of the S. E. cor. of Sec. 13, of the H. T. & B. R. R. Co. surveys.

2nd. Tract; 80 acres, being the N. one-half of the N. E. one-fourth of sec. 34, blk. 5 of the H. & T C. Ry. Co. surveys.

(Well on first tract herein to be begun within 30 days from date hereof and a well on the second tract must be begun not later than 60 days from date hereof; and to be drilled as hereinafter conditioned.)

To begin actual drilling of well on said premises within 30 days;

In case the first well drilled hereon shall be a dry hole or for any reason abandoned, then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun
115 any additional well shall be prosecuted with due diligence and as provided for in well number 1.

Acknowledgment, taken before Trula Kennedy, N. P., Wichita Co., Texas, December 26th, 1921.

Exhibit number "8", same form as exhibit number "4" copied in full, on pages 47 and 105 of this record, with the following exceptions:

Dated February 14th, 1922;

The Panhandle Refining Company, Lessee;

First tract: Being 80 acres, more or less, and being the S. one-half of the N. E. one-fourth of sec. 27, in blk. No. 5, of the H. & T. C. R. R. Co. survey.

Second tract: Beging 20 acres more or less and being the N. one-half of the S. W. one-fourth of the N. E. one-fourth of sec. No. 34, in blk. No. 5, of the H. & T. C. Ry. Co. survey.

Acknowledgment, taken before Lila Mae Solomon, Notary Public Wichita Co., Texas, February 14th, 1922.

Exhibit number "9", same in form, as Exhibit number "6" copied in full in this record on pages 56 to 61, with the following exceptions:

Dated December 27th, 1921;

W. J. Grisham, of Wichita Falls, Texas,
116 Lessee;

80 acres, more or less, being the S. one-half of the N. E. one-fourth of the N. W. one-fourth and the north one-half of the S. W. one-fourth of the N. W. one-fourth and the S. E. one-fourth and of the N. W. one-fourth of section No. 34, in block No. 5, of the H. & T. C. Ry. Co. surveys;

To begin actual drilling of a well on said premises within 30 days of the date hereof;

In case the first well drilled hereon shall be a dry hole or for any reason abandoned, then this lease may be continued in effect by the drilling of additional well or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

Acknowledgment, dated December 31st, 1921.

Exhibit Number "10," being the same in form as Exhibit Number "6," on pages 56 to 61 of this record, with the following exceptions:

Dated December 27th, 1921;

Jno. F. O'Donehue, of Wichita Falls, Texas, Lessee;

8 acres out of sec. 33, blk. 5 of the H. & T.
117 C. Ry. Co. surveys, being the W. one-half of the S. E. one-fourth of the S. E. one-fourth of said sec., less that part reserved by the Texas Co. lease; also the S. one-half of the S. E. one-fourth of the S. W. one-fourth of said sec. 33; also the S. W. one-fourth of the S. W. one-fourth of said sec. 33.

To begin actual drilling of a well on said premises within 35 days from date hereof;

In case the first well drilled hereon be a dry hole, or for any reason abandoned, then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

Acknowledgment taken December 26th, 1921.

Exhibit number "10A", same in form as exhibit number "4" copied in full on pages 51 of this record, with the following exceptions:

Dated, May 12th, 1922;

E. P. Bass, of Wichita Falls, Texas, Lessee;
Consideration $975.00;

118 6.5/10 acres out of the A. Gibson survey, as follows:

Beginning at the N. W. cor. of 42 acres heretofore leased to C. H. Clark; a stake in the N. line of said Gibson survey; thence west 422 feet the N. E. cor. of a tract heretofore leased to E. P. Bass; thence south with said Bass' E. line 736 feet a stake in the N. line of Jno. Brownlee tract; thence E. 18 E. to the N. E cor. of said Brownlee tract; thence S. 18 E. 13 feet a stake in Brownlee's E. line; thence East to the S. W. corner of the C. H. Clark tract; thence north with Clark's W. line 700 feet to the place of the beginning.

Acknowledgment, taken May 12th, 1922.

Exhibit Number "11," being the same in form as exhibit number "6," copied in full on pages 56 to 61 of this record, with the following exceptions:

Dated Jan. 19th, 1922;

Weaver Johnson Drilling Co. & E. W. Barr, Lessees;

40 acres out of the N. E. cor. of sec. 13 of the H. T. & B. R. R. Co.;

Beginning at a stake, the N. E. cor. of said sec. in the center of the Electra & Archer city road; thence west with the N. line of said sec. 475 vrs. a stake; thence south 475 vrs. a stake; thence east 475 vrs. a stake in center of above mentioned road; thence north 475 yrs. to the place of beginning;

119 To begin drilling of a well on said premises within 30 days from date hereof; and to prosecute the drilling thereof with due diligence to a depth of 1400 feet, unless oil or gas is found in paying quantities at a lesser depth. If no well be commenced herein within 30 days from date hereof, etc. * * *

The following words omitted from the fourth paragraph "or the completion of said well as the lessor may choose."

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereof.

Acknowledgment, dated January 19th, 1922.

(Following on back of said lease:) When the said Stovall has paid the said Waggoner the sum of $860.00, said amount to be paid by one half of the one/4 royalty herein, then the said Waggoner from and after such date shall only receive the 1/8 of said oil and the other 1/8 shall go to said Stovall.

120 Exhibit Number "12," being the same, in form, as exhibit number "4," which is copied in full on pages 51 of this record, with the following exceptions:

Dated February 10th, 1922;

Fred M. Gates, of Wichita Falls, Lessee;
Consideration, $4,000.00;

Being the north-west one-fourth (NW¼) of the south-west one-fourth (SW¼) of section No. thirty-three (33) in block No. five (5), of the H. & T. C. Ry. Co. surveys, and containing 40 acres more or less.

Acknowledgment, taken 10th day of Feb., 1922.

Exhibit Number "13," being as follows:

Exhibit 13—Lease, W. T. Waggoner to Charles F. Spencer, Nov. 1, 1921, omitted being heretofore copied at page 44.

* * * * * * * *

124 The State of Texas,
County of Wilbarger.

Before me, G. M. Allman, a Notary Public, within and for Wilbarger Co., Texas, on this day personally appeared H. L. More, agent and attorney in fact for W. T. Waggoner, known to me to be the person whose name is subscribed to the foregoing instrument and he acknowledged to me that he executed the same for the purposes and consideration therein expressed.

125 Exhibit number "14" being the same, in form, as exhibit number "4" copied in full in this record, on pages 51, with the fol'owing exceptions:

Dated May 10th, 1922;

W. E. Norton & Jno. F. O'Donohue, of Wichita Falls, Texas, Lessees;

Consideration $9848.00;

49.24/100 acres out of the A. Gibson survey, as follows:

Beginning at a pile of stone in the W. line of 80 acres out of said survey heretofore leased to the Planet Petroleum Co., at a point 1301 feet S. 18 E. of the N. W. cor. of said Planet Petroleum Co. tract; thence S. 72 W. with the N. line of the United Drilling & Develop-

ment Co. lease, the N. line of the Joe Howell lease and the N. line of the Criswold lease, 2663.2 feet, the N. W. cor. of the Griswold 80 acres, in the W. line of the John Brownlee lease; thence N. 18 W. with the E. line of the Brownlee lease, 1236 feet, the S. W. cor. of 40.15 acres heretofore leased to the Griswold Oil Co.; thence east with the south line of the Griswold and Ladd & Hannan leases, 2799.3 feet to the place of beginning.

Acknowledgment taken 11th day of May, 1922.

126 Exhibit number "15", same as exhibit number "6," copied in full on pages 56 to 61 of this record, with the following exceptions:

Dated, February 10th, 1922;

J. G. Flowers and C. O. Davis, of Wichita Falls, Texas, Lessees;

That for and in consideration of the sum of one dollar, cash in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the covenants and agreements hereinafter set out to be kept and performed by the lessee, have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee, for the sole and only purpose of drilling and mining for gas and oil the following lands in Wichita County, Texas, to-wit:

Being eighty (80) acres, same being the north one-half (N½) of the southeast one-fourth (SE¼) of section No. 28, in block No. five (5) of the H. & T. C. Ry. Co. surveys, containing 50 acres, more or less

To begin the actual drilling of a well on said premises within 30 days * * *.

If no well be commenced hereon within 30 days * * *

Acknowledgment taken before H. E. Rogers, N. P. On the 11th day of February, 1922.

127 Exhibit Number "16," being the same as exhibit number "6," copied in full on pages 56 to 61 of this record, with the following exceptions:

Dated, October 17th, 1922;

Bankers Petroleum Co. (Corp.) of Spokane, Wash., Lessees;

80 acres more or less, being the northwest one-fourth of the southeast one-fourth and the northeast one-fourth of the southwest one-fourth of section No thirty-three (33) in block No. five (5) of the H. & T. C. Ry. Co. surveys.

To begin the actual drilling of a well on said premises within 43 days * * *.

If no well be commenced hereon within 43 days * * *

All drilling operation inures to the benefit of the lessee herein, prior to the date hereof.

(Following two paragraphs omitted).

This lease shall not be transferred and no transfer hereof shall be made without the written approval of W. T. Waggoner.

The lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

Acknowledged, Oct. 17th, 1922.

128 Exhibit Number "17," reading as follows:

Section 14 H. T. & B.
C. F. Kolp Lease.

June 7th, 1922.

Mrs. P. M. Kebort,
Ft. Worth, Texas.

Dear Miss Phil:

May 16th. I mailed you additional leases on the above lease, and to take the place of the original C. F. Kolp lease.

Mr. Kolp failed to put this over and finally executed leases direct to the parties.

This is to keep your records straight and to do away with the transfers (leases to the Humble and Hobbs on the above.

Yours,

R. L. MORE.

Exhibit Number "18," reading as follows:

Sec. 14 H. T. & B. R. R.
Humble O. & R. Co. Lease,
Hobbs Oil Co.

May 12th, 1922.

Mr. C. F. Kolp.
Electra, Texas.

Dear Chas.:

This will confirm our agreement and be your conveyance for all of the Oil Rentals called for in the above leases, except as to the one-eight royalty called for there-

in, and the Humble Oil & Refining Co., and
129 the Hobbs Oil Co., are hereby instructed to deliver to you said oil, or the money therefor, as you may elect.

The one-eighth royalty called for in said leases to remain the property of and be delivered to Mr. W. T. Waggoner.

Yours,

Agent & Atty. in Fact for
W. T. Waggoner.

Exhibit number "18A", being the same as exhibit number "6," which is copied in full on pages 56 to 61 of this record, with the following exceptions:

Dated, May 11th, 1922;

Humble Oil & Refining Co., of Wichita Falls, Texas, Lessees;
Consideration, $20,000.00;

50-4/10 acres out of section No. 14, H. T. & B. R. R. Co. survey, abstract No. 505, of Wichita County, Texas, and bounded as follows:

Beginning at a stake in the E. line of said sec. 14, 1189 feet north of the S. E. corner of said survey; thence west 1320 feet a stake, the S. W. cor.
130 of this tract; thence north 1851 feet a stake in the S. B. Line of the F. W. & D. C. Ry. Co. right of way; thence S. 69 28′ W. with said right of way 1475.4 feet a stake in the E. line of said sec 14;

thence south with said east line and the center of the Archer city & Electra road 1320-7/10 feet to the place of beginning.

To begin the actual drilling of a well on said premises within 30 days * * *.

If no well be commenced within 30 days from date hereof * * *

Acknowledgment taken 18th day of May, 1922.

Exhibit number "18B", being the same as exhibit number "6," which is copied in full on pages 56 to 61 of this record, with the following exceptions:

Dated May 12th, 1922;

C. F. Kolp of Electra, Texas, Lessee;

16 acres more or less out of sec. 14 of the H. T. & B. Ry. Co. survey in Wichita Co., Texas, as follows: Beginning at a stake in the E. line of said sec. 14, 660 feet north of the S. E. cor. of said sec. 14; thence west 1320 feet a stake; thence north 520 feet a stake the S. W. cor. of 60 acres leased to Humber O. & R. Co.; thence east 1320 feet a stake in the E. line of said sec. 14; thence south 529 feet to the place of beginning.

131

To begin the actual drilling of a well on said premises within 60 days * * *

If no well be commenced hereon within 60 days * * *

Acknowledgement taken 18th day of May, 1922.

Exhibit Number "19," being the as exhibit number "4," copied in full on pages 51 of this record; with the following exceptions:

Dated June 14th, 1922;

James A. Moore of New York, Ny., Lessee;
Consideration, $21,200.00;

53 acres out of section No. fourteen (14) of the H. T. & B. R. R. Co. survey, as follows:

Beginning at a stake in prairie, 2520 feet west of the S. E. cor. of said sec. 14, and said point being the S. W. cor. of 50 acres heretofore leased to Hockaday and Shaw; thence west with the S. line of said sec. 14, 613.3 feet a stake, the S. E. corner of Texas Co. lease out of said sec. 14; thence north with the E. line of said Texas Co. tract, 37.62.6 feet a stake in the S. E. line of the original town of Electra, Texas; thence No. 82 11' E. with said townsite line, 488.7 feet a stake in the
132 S. B. line of the F. W. & D. C. Ry. right of way; thence S. 63 28' E. with the said right of way S. line to the N. W. corner of said Hockaday & Shaw lease; thence south with the west line of said Hockaday and Shaw lease, 3795.6 feet to the place of beginning.

As a part of the consideration hereof, the lessee covenants and agrees and binds himself, to begin the actual drilling of a well on said premises within three years from date hereof, and to prosecute the drilling thereof with due diligence to a depth of 2000 feet, unless oil or gas is found in paying quantities at a lesser depth.

If no well be commenced hereon within three years from date hereof, or if a well is begun and the drilling thereof is not prosecuted with due diligence, as herein provided, or if said well is abandoned or drilling thereon shall cease for as much as 30 days at any time, then this lease shall immediately become null, void and of no effect and shall automaticaly rever to the lessor herein, with or without action in any Court, but no drilling is imposed and no forfeiture for failure to continue drilling shall have expired.

All tools and material placed on said lease by the lessee or those acting for or under him, shall be liable to and stand for whatever expense the lessor
133 may be to in the plugging or abandonment of said well or the completion of said well, as the lessor may choose.

In case the first well drilled hereon shall be a dry hole or for any reason abandoned then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

Subject to the terms and conditions herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however, no one well shall hold more than ten acres, in a square form, said well being the center thereof.

(The following paragraph omitted.)

No rotary drilling shall be done hereon, within the written consent of the lessor.

Acknowledged, June 10th, 1922; before James, N. P. Wichita Co., Texas.

134 (Letter attached reading as follows:)

Mrs. P. M. Kobort,
Ft. Worth, Texas.

Dear Miss Phil:

Herewith inclose copy of above lease, together with Mr. Jas. A. Moore check on City Natl. of Wichita Falls, for $21.200, being the cash rental.

This lease also carries a like amount in oil.

Exhibit Number "20," being the same as exhibit number "4," copied in full in this record on page 51; with the following exceptions:

Dated, Feby. 15th, 1922;

J. F. O'Donohue, Wichita Falls, Lessee;
Consideration, $7,000.00;

1st. Tract: 18.81 acres out of sec. No. 33, blk. 5 of the H. & T. C. Ry. Co. surveys; beginning at the S. E. cor. of said sec. 33; thence N. 17 W. 1285 feet a stake; thence S. .72 W. 637.62 feet a stake; thence S. 18 E. 1285 feet a stake; thence N. 72 E. 637.62 feet to the place of the beginning.

2nd. tract: 21.19 acres out of sec. 33, blk. 5
135 of the H. & T. C. Ry. Co. surveys Beginning at a stake 771 feet S. 72 W. and S. 18 E.

2128.25 feet from the N. E. corner of said Sec. 33, same being the S. E. cor. of a tract this day leased to J. F. McCarry and also the west line of a tract leased to The Texas Co.; thence S. 18 E. 1830.5 feet a stake; thence S. 72 W. 504.24 feet a stake; thence N. 18 W. 1830.5 feet a stake, the S. E. cor. of the McCarry tract; thence N. 72 E. 504, 24 feet to the place of beginning.

Acknowledgment dated February 18th, 1922.

Exhibit number "21," being the same as exhibit number "4," copied on pages 51 of this record; with the following exceptions:

Dated April 14th, 1922;

E. F. Griswold, S. M. Griswold, trustees for the Griswold Oil Co., a joint stock Co. of Wichita Falls, Texas, Lessees;

Consideration, $6,000.00;

In Wilbarger County, Texas;

40 acres out of the S. E. corner of section No. sixteen (16) in block No. thirteen (13) of the H. & T. C. Ry. Co., survey as follows:

136 Beginning at the S. E. corner of said section No. 16; thence N. 18 W. 475 vrs. a stake in the E. line of said sec. 16; thence S. 72 W. 475 vrs. a stake; thence S. 18 E. 475 vrs. a stake in the S. line of said section No. 16; thence N. 72 E., with the S. line of said section, 475 vrs. to the place of beginning.

Acknowledgment taken April 17th, 1922.

Exhibit Number "22," being the same as exhibit number "4," copied in full on pages 51 of this record, with the following exceptions:

Dated April 14th, 1922;

E. F. Griswold and S. M. Griswold, Trustees for the Griswold Oil Co., a joint stock Co. of Wichita Falls, Texas, lessees;
Consideration, $4095.00;

27.3 acres of land, out of the A. Gibson survey, as follows:

Beginning at a stake, 599.8 vrs. east and 325 vrs. south of the N. E. cor. of sec. No. 34, in block No. 5 of the H. & T. C. Ry. Co. surveys; thence East 401.2 vrs. a stake, the line of said Ladd & Hannah tract, 475 vrs. a stake, their S. W. corner; thence west 246.9 vrs. a stake in the E. line of 80 acres leased to Jno. Brownlee; thence N. 18 W. with Brownlee's east line 499.4 vrs. to the place of beginning.

137 Acknowledgment, taken April 17th, 1922.

Exhibit Number "23" being the same as Exhibit number "6," copied in full on pages 56 to 61 of this record; with the following exceptions:
Dated June 21st, 1922;
Planet Petroleum Co., of Fort Worth, Texas, lessee;
1-3/4 acres more or less out of the A. Gibson survey, as follows:

Beginning at a point in the E. line of 40 acres out of said survey heretofore leased to Ladd & Hannan, and now known as the Crateret Oil Co. lease, and at the N. W. cor. of 4.53/100 acres leased to Burns and Gates, May 10th, 1922, thence East 325 feet a stake in center of Archer city and Electra road; thence in a N. E. direction with the center of said road to a point in the E. line of 42 acres out of said Gibson survey heretofore leased to C. H. Clark; thence south with the east line of said Clark lease and the E. line of the Ladd and Hannan 40 acres tract, 472 feet to the place of beginning.

To begin actual drilling of a well on said premises within 30 days * * *

If no well be commenced hereon within 30 days from date hereof * * *.

All tools and material placed on said lease
138 by the lessee or those acting for or under him, shall be liable to and stand for whatever expense the lessor may be to in the plugging or abandonment of said well, or the completion of said well, as the lessor may choose.

In case of the first well drilled hereon shall be a dry hole or for any reason abandoned then this lease may be continued in effect by the drilling of additional well, or wells, provided that not more than 60 days shall elapse between the completion or abandonment of one well and the beginning of another. Once begun any additional well shall be prosecuted with due diligence and as provided for in well No. 1.

(The following paragraph omitted.)

No rotary drilling shall be done hereon, without the written consent of the lessor.

Acknowledgment, taken July 3rd, 1922.

(Letter Attached.)

July 3rd, 1922.

Planet Petroleum Co.,
F. & M. Bank Bldg.,
Ft. Worth, Texas.

Gentlemen:

Herewith inclose you original of above lease, as per your request.

Yours,

139 Exhibit Number "24" being the same as exhibit number "6" copied in full, on pages 56 to 61 of this record, with the following exceptions:

Dated August 1st, 1922;

F. R. Guinby, of Wichita Falls, Texas, lessee;

80 acres more or less out of the A. Gibson survey, beginning at a point in the west line of said Gibson survey, the S. W. cor. of a tract out of said Gibson survey heretofore leased to E. P. Bass, a stake, 1144 feet S. 18 E. of the N. E. corner of sec. 45, Blk. 5, of the H. & T. C. Ry. Co. surveys; thence N. 72 E. 1320 feet a stake; thence S. 18 E. 2640 feet a stake; thence S. 72 W. 1320 feet a stake in the West line of said Gibson survey; thence N. 18 W. 2640 feet to the place of beginning.

This lease is executed by W. T. Waggoner and received by said Quinby and those claiming under the lease heretofore executed to John Brownless, and to take the place of said Brownlee lease and the Brownlee lease is to be

surrounded by the legal owners at this date to W. T. Waggoner, and said original John Brownlee lease to be null, void and of no effect from and after this date.

To begin the actual drilling of a well on said premises within 30 days from date hereof * * *

140 If no well be commenced hereon within 30 days * * *

(Following paragraph omitted.)

No rotary drilling shall be done hereon without the written consent of the lessor.

Acknowledgment taken before G. M. Allman, N. P., August 7th, 1922.

Plaintiff next offered Exhibit No. 25 as follows, being an instrument in writing executed by W. T. Waggoner to the Texas Company, called a lease on lands, which recites, so far as the material facts are concerned, this:

"Know all men by these presents: That the said W. T. Waggoner, in consideration of the premises, and the sum of $5.00 to him cash in hand paid by The Texas Company, the receipt of which is hereby acknowledged, and of the royalties to be paid and the covenants to be kept hereunder, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey to the said The Texas Company, a domestic corporation, all the oil, gas, coal, and other minerals in and under the hereinafter described tracts of land, together with the exclusive right of ingress and egress at all times for the purpose of prospecting, drilling,

mining, and otherwise operating thereon, and
141 to erect, maintain, and remove all structures and appliances in connection therewith, including the right to pull piping from wells, and to lay, maintain, and remove all pipe lines and other means of storage, reserving, however, the royalties and payments hereinafter stipulated, the said land to consist of 11,102 acres, more or less, lying and being situated in the counties of Wichita and Wilbarger, in the State of Texas, and being more particularly described as follows, to-wit:

80 acres out of the north half of the southeast quarter of section 37, H&TC. R. R. Co. Survey, Block 14, Wilbarger County, Texas.

All of section 39; and an additional 480 acres out of section 40; a part of section 33 containing 480 acres; 400 acres out of section 34, all located in H&TC R. R. Co. Survey Block 14, Wilbarger County; also all of section 14, block 13, H&TC R. R. Co. Survey; 271.3 acres out of section 13, block 13, H&TC R. R. Co. survey; all of section 7, block 13, of said survey, except 60 acres; 378.8 acres out of section 4, block 13, of said H&TC R. R. Co. Survey; 199 acres, being all of section 4, block 13, said survey; 109.8 acres out of section 6, block 13, said survey; all of section 16, block 13, H&TC R. R. Co. survey, except 20 acres; all in Wilbarger County, Texas.

Also all of section 30, block 5, H&TC R. R.
142 Co. Survey, in Wilbarger and Wichita Counties, Texas. All of the M. McLauren survey No. 3, lying in Wichita County and Wilbarger County, Texas. 176.7 acres of land out of section 20, block 5, H&TC R. R. Co. survey, Wilbarger County; all of section No.

1, GC&SF Ry. Co. Survey, Wichita County, containing 326.5 acres of land, more or less; all of section No. 2, GC&SF Ry. Co. survey, containing 640 acres, in Wichita and Wilbarger Counties, Texas; 59 acres out of section 4, GC&SF Ry. Co. Survey, Wichita County; 148.9 acres out of section 3, GC&SF Ry. Co. survey, Wichita County, Texas; all of section 147, block 14, H&TC Ry. Co. survey, Wichita County; all of S. Holloway survey, same county; all of section 20, GC&SF Ry. Co. Survey, Wichita County; all of section 18, GC&SF Ry. Co. survey, Wichita County; all of section 1, TC. RR. Co. Survey, containing 438.5 acres, more or less, in Wilbarger and Wichita Counties; 80.4 acres out of T. C. R. R. Co. survey section 2, Wichita County; 218.6 acres out of section 14 HT&B R. R. Co., Wichita County; a parcel of land out of section 148, H&TC Ry. Co. Survey, Wichita County; 203.8 acres of land out of Survey 13, HT&B R. R. Co. Survey, same county; the F. J. Cook Survey, containing 33 acres, same county; 252.2 acres known as the John Bradley survey, same county; all of Seale & Morris Survey No. 1, containing 616 acres,
143 same county; all of Seale & Morris Survey No. 2, same county; all of D. L. & C Ry. Co. Survey, same county; 70.9 acres out of section 33, H&TC R. R. Co. Survey, Block 5, Wichita County, Texas.

Also, subject to the royalty, the mineral rights in the 250 or 300 acres where the town of Electra is located.

The instrument further recites, after the descriptions as aforesaid, which descriptions are set forth in the instrument in full detail, "To have and to hold the said lands to the said The Texas Company, its successors and assigns, as long as oil is produced therefrom in paying quantities.

"It is agreed that the royalties above mentioned shall be:

(a) On oil, a quantity equal to one-eight of all produced and saved, the same to be delivered at the wells or to the credit of the grantor herein, in the pipe line to which the wells may be connected.

(b) On natural gas, at the rate of two hundred dollars per annum, payable annually, for each well producing gas exclusively, and from which gas is being used or sold off the premises, it being understood that the grantor shall have the privilege, at his own risk and expense, of making connection and using
144 gas from such well free of charge for one dwelling on said land.

(c) On coal, four cents per ton for every ton mined and marketed, payable monthly; and,

(d) For any other minerals discovered, one-eighth of the gross proceeds arising therefrom while the same are being used off said premises.

It is further agreed: First: There are now located on said premises a large number of oil wells drilled thereon by the said The Texas Company, or its assigns or sub-lessees. There is, therefore, imposed on The Texas Company the duty only of reasonable diligence in the drilling of additional wells and producing oil and gas therefrom, and also the duty of protecting said lands from drainage by third parties operating on adjacent lands, by the drilling of the necessary offsets wells on the land hereinbefore described.

Second: The Texas Company, acting herein by C. M. Scott, Manager of its producing department, who is duly authorized thereunto, in consideration of the premises and the sum of $5.00 cash, to it in hand paid by the said W. T. Waggoner, the receipt of which is hereby acknowledged, has released and acquitted, and by these presents does hereby release, relinquish and forever quitclaim unto the said W. T. Waggoner, any and all rights whatsoever acquired or held by it under said oil, gas and mineral lease originally executed by the said W. T. Waggoner, to the said The Texas
145 Company on December 7, 1909, first above referred to, said lease consisting of 270,000 acres of land, more or less, located in Wichita, Wilbarger, Baylor and Archer counties, in the State of Texas, save, however, and exception from said release and acquittance the lands described in the foregoing paragraphs hereof, which is reserved by the said The Texas Company from the release hereby granted.

To have and to hold the above lands so released, unto the said W. T. Waggoner, his heirs and assigns, forever, free and acquit of any right, title or claim that the said The Texas Company may have by virtue of said original lease or otherwise; provided, however, that the said The Texas Company is hereby granted a reasonable time to remove from said premises so hereby released any and all machinery, appliances, material, and trade fixtures placed thereon, either by it or its successors or assigns.

Third: It is agreed, however, that save and except as this contract modified and reforms the original contract of date December 7, 190.., or the particular modifications and additions to the same that is recited in

the preamble hereof, that all the terms and conditions of said modifications and additions recited in said preamble, shall remain in full force and effect.

Fourth: It is further agreed as to the lands
146 released hereon to the said W. T. Waggoner, that said release is to be as to the oil, gas and other minerals, and is not intended in any particular to effect the rights of the Texas Company, or its successors or assigns, to any easement for pipe line or lines, or to any other right that may exist by virtue of the other contracts not herein specially referred to, but when the same shall remain, if there be any, in full force and effect."

All of the foregoing lesses referred to were not only duly and regularly signed by the lessor, but were duly acknowledged as required by the Statutes of Texas, and were filed for record and recorded in the deed records of Wichita County, Texas.

The last preceding instrument, to-wit: Exhibit No. 25, refers to a certain prior lease executed by W. T. Waggoner, and the said lease so referred to was introduced in evidence, showing in substance that the said W. T. Waggoner, on December 7th, 1909, executed same to The Texas Company, said lease containing these material recitals:

W. T. Waggoner, the grantor, for the consideration of $25,000 cash, and of the royalties to be paid and covenants to be kept therein, "does hereby grant, bargain, sell and convey unto the said The Texas Company, a corporation of Texas, grantee, all of the oil, gas, coal

and other minerals in and under the hereinafter described land together with the exclusive right
147 of ingress and egress at all times for the purpose of prospecting, drilling, mining and otherwise," etc.

* * * "Said land consists of 270,000 acres, more or less, in Wichita, Wilbarger, Baylor and Archer Counties, in the State of Texas, and it is intended hereby to include all mineral rights owned by the grantor in said counties," etc.

To have and to hold unto said grantee and the successors and assigns of said grantee forever, upon the following terms:

"1. The royalty above mentioned shall be (a) on oil, one-eighth of the gross proceeds of sale or, at the grantor's option, a quantity equal to one-eighth of all produced and saved upon the premises, the same to be delivered at the wells or to the credit of the grantor in the pipe line to which such wells may be connected," etc.

Exhibit No. 25 further declares that "save and except as the 1909 lease is modified" by exhibit No. 25, it remains and continues in effect.

148 Mr. Boone:

I understand the tax is due from the owner of the property as of January 1st, of each year, if he sells it the owner of the property as of January 1st owes the tax, and those deeds are dated June 23rd, after January 1st, of course.

The Court:

But this is a proceeding to stop certain efforts on the part of the county to make a collection, I suppose that is the reason.

Mr. Barwise:

I had no point at all, except to be in the position of showing in the record that the one who has the right to enjoin this, and remove the cloud from the title, is a party to the suit, that is all. As Mr. Boone states, of course, W. T. Waggoner is liable for that tax and he cannot escape, but I want to show the proper parties are in here.

Mr. Barwise:

I will just state that the Waggoner estate acquired all these properties as of March 1st, 1923.

Mr. Boone:

We agree to that.

Mr. Barwise:

You can show these conveyances were dated in June.

Mr. Boone:

Let the conveyances go in the record for that purpose.

Mr. Barwise:

For those purposes.

The Court:

I do not see any use to encumber the record, no controversy on the point, is there?

149 The Court:

As I see the case, the jurisdiction here, on the equity docket, is based upon an allegation of fraud; that is constructive fraud; not a fraud, as we understand it, in the bad sense, but a constructive fraud, growing out of an alleged discrimination; I cannot see how statements between a grantor and a grantee as to what they might think as to their respective interests would throw any light on this suit. I hardly think it would be a binding declaration as to a stranger.

Mr. Barwise:

The transaction conveys, all the accounts and choses in action, of every kind and character whatsoever.

The Court:

I think in view of counsel's admission that he makes no question about the transfer that the instrument would be a useless encumbrance of the record.

Mr. Boone:

The Court may not have my idea in mind; there are two very essential points in this case, as I see them, one is whether or not the royalty is real estate; and another one is, whether it is personalty. If personalty they are seeking to have it assessed for taxes in Tarrant county, the residence and domicile of the owner; now the declarations of the parties is admissible against them to show what they considered it, as personalty or realty,——

150 The Court:

Well, without passing in any way upon those matters, counsel for the plaintiff must prove his case,

of course, if you do not see fit to make any agreement, why it is all right.

Mr. Barwise:

We introduce in evidence this instrument, which is a conveyance by W. T. Waggoner, and his wife, dated the 13th day of June, 1923, conveying to the W. T. Waggoner estate, all the land interest then in Wichita County.

(Exhibit Number 28.)

State of Texas,
County of Tarrant:

Know all men by these presents, that we, W. T. Waggoner, and wife, Ella Waggoner, of the county of Tarrant and State of Texas, in consideration of the sum of one dollar ($1.00) to us cash in hand paid by W. T. Waggoner estate, (a trust) receipt of which payment is acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said W. T. Waggoner estate (W. T. Waggoner, trustee to be held subject to the declaration of trust, dated March 31, 1923) of the county of Tarrant and State of Texas, and wherever situate in said state and all interest and claims of any and every kind or character in said lands, including oil and gas rights and interests, except the following, to-wit:

151 (1) This conveyance does not include, but expressly excludes the following described property, in the city of Fort Worth, Tarrant County, Texas, which is the separate estate of the grantor, Ella Waggoner, to-wit:

Lots Nos. six (6), seven (7), and eight (8) in block No. five (5) of the city of Fort Worth, Tarrant County, Texas, being the property on which the W. T. Waggoner building is located; nor does this conveyance include any income, rent or revenue from this property.

(2) This conveyance does not include, but expressly excludes, all land of any and every kind or character whatsoever owned by the grantors in Tarrant County, Texas.

(3) This conveyance does not include, but expressly excludes and reserves to the grantors all royalty oil from said lands that will be produced up to and including March 31, 1923.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said W. T. Waggoner estate and its successors and assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever de-
152 fend all and singular the said premises unto the said W. T. Waggoner estate and its successors, and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness our hands at Fort Worth, this the 13th day of June, A. D. 1923.

(Signed) W. T. WAGGONER.
(Signed) ELLA WAGGONER.

State of Texas,
County of Tarrant.

Before me the undersigned authority on this day personally appeared W. T. Waggoner and Ella Waggoner, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and the said Ella Waggoner, wife of the said W. T. Waggoner, having been examined by me privily and apart from her husband and having the same fully explained to her, she the said Ella Waggoner, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this
153 13th day of June, A. D. 1923.

(Signed) F. A. ROGERS,
Notary Public in and for
Tarrant County, Texas.

154 Mr. Barwise:

Next we offer in evidence plaintiff's exhibit number "29," which is a transfer of personal property by W. T. Waggoner and his wife, to the W. T. Waggoner estate, which instrument conveyed all personal property owned in the State of Texas, wherever situated, and of every kind and any kind or character, whatsoever, including all corporate stocks, accounts, notes, choses in action of every kind, money on hand, live stock, etc., (Exhibit number "29"), as follows:

State of Texas,
County of Tarrant.

Know all men by these presents: that we, W. T. Waggoner and wife, Ella Waggoner, of the county of Tarrant and state aforesaid, for and in consideration of the sum of one dollar, to us paid by the W. T. Waggoner, estate, (a Trust, W. T. Waggoner, trustee, to be held subject to the declaration of trust dated March 31st, 1923), receipt of which payment is hereby acknowledged, have bargained, sold and delivered and by these presents, do bargain, sell and deliver, unto the said W. T. Waggoner, estate, of the county of Tarrant and state of Texas, all of the personal property owned by us in the State of Texas, and wherever situate, and of every kind and character whatsoever, including, among other things, all corporate stocks, accounts, notes,
155 choses in action of every kind, money on hand, livestock and farm implements, intending hereby to convey all of our personal estate of any and every kind or character whatsoever, except the following:

(1) Household furnishings, and personal effects, and automobiles, used for pleasure.

(2) The income, rents and revenue from the W. T. Waggoner Bldg., situated on lots 6, 7, and 8 in Block No. 5, of the city of Fort Worth, Tarrant County, Texas.

(3) All cash on hand and in banks, as of March 31st, 1923.

(4) All accounts due and owing to me from the Waggoner Refining Co., as of March 31st, 1923.

(5) All income and revenue arising from the sale of oil produced from Royalties owned by me, both accrued and according to and including March 31st, 1923.

(6) 300 shares—Capital stock, International Life Ins. Co.

100 shares—Capital stock, Midland Sec. Co. Inc.

150 shares—Capital stock, Agricultural Live Stock Cor.

41 shares—Capital stock, Evens-Snider-Buel Co. of Tex.

156 17½ shares, capital stock, Continental Nat. Bank of Fort Worth.

50 shares—Capital stock, Ralston Purina Co.

311 shares—Capital stock, First National Bank, Fort Worth, Texas.

41 shares—Capital stock, First National Bank, Rhome, Texas.

121 shares—Capital stock, First National Bank, Decatur, Texas.

97) And further excepting the personal property which we have on this day and by separate bill of sale sold and delivered to the W. T. Waggoner estate, at the price of One Million, Five Hundred Eighty-Two Thousand, Nine Hundred Twenty-Four and Ninety-one hundredths ($1,582,924.09). The said bill of sale is hereby referred to for the description of the property so sold to said W. T. Waggoner estate by said separate instrument.

And we do hereby bind ourselves, our heirs, executors and administrators and assigns to forever warrant and defend the title to the said property unto the said W. T. Waggoner estate and its successors and assigns, against every person whosover lawfully claiming or to claim the same or any part thereof.

157 Witness our hands at Fort Worth, Texas, this 13th day of June, A. D. 1923.

(Signed) W. T. WAGGONER.

(Signed) ELLA WAGGONER.

State of Texas,
County of Tarrant.

Before me, the undersigned authority, on this day personally appeared W. T. Waggoner, and Ella Waggoner, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and the said Ella Waggoner, wife of the said W. T. Waggoner, having been examined by me privily and apart from her husband, and having the same fully explained to her, she the said Ella Waggoner, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed and that she did not wish to retract it.

Given under my hand and seal of office this 13th day of June, A. D. 1923.

(Signed) F. A. ROGERTS,
(Seal) Notary Pub. in and for Tarrant County, Texas.

(Recorded, Sept. 18th, 1923, in bill of sale records, Vol. 2, page 366, Wilbarger County, Texas.)

158 Mr. Barwise:

Let the record show, that the exhibit which is called for of the rendition of Kemp & Kempner, is on form B, and the form B on which it is, is the Form B that was spoken of in the evidence by the witness Deaton, making it unnecessary to have in evidence the two exhibits, but the one serves the purpose.

J. C. GWYNNE, witness for the plaintiffs, being first duly sworn, examined in chief by Mr. Barwise, testified as follows:

My name is J. C. Gwynne; I live in Wichita Falls and have lived in this county since 1920; I am engaged in the oil business, and am associated in the oil business with Staley. I have been engaged in the oil business about two years. I am the owner of oil properties, interested in properties. I am familiar, I think, with the number of oil fields there are in Wichita County, Texas, so that I can state the different field there are, and the parts of the county in which they are and the names by which they are known among the oil fraternity. I do not know whether I can give the names of all of them or not, I may omit some of them; the principal ones are, Burk townsite pool, and the Northwest pool, Electra pool, the district south of the Burkburnett fields; the Shappel pool in the Iowa Park section; the
159 Hurshey pool, that is giving some of them generally. There were quite a number of producing oil wells in Wichita county on January 1, 1923, and in the year 1923. That you may have a general idea in the record I would say there were 4400 producing wells in Wichita county. That figure is applicable to the period of January 1st, 1923; that 4400 would not be exactly accurate, but that is the proximate number; wells are brought in or junked every few days. I am familiar with the equipment necessary to oil from the producing oil wells in Wichita County. As to what the usual equipment consist of, will say: wells above, we will say, 100 barrels production, consist, generally, of casing, tubing, rods, standard rig, gasoline engine, or gas engine, and tanks, production tanks, flow lines; wells perhaps that are making small production, that have settled down to

their normal production or to a small production, are equipped with tube, rods and casing; and the pump jack; pull rod line pumped by a central power plant which usually takes care of 12 to 20 wells successfully. They usually have a pumper's shack, very often a warehouse if the lease is of sufficient size to justify it. The casing is the casing that reaches from the surface of the ground to the top of the well; rotary holes, sometimes in standard holes there are several strings of casing. The depth of the hole in this country in which oil is
160 found varies; the larger producing wells, a greater number will probably run from 1400 feet to 1900 feet, the large majority of the wells are in that producing level, although there is production of from 150 to 2200 feet. A pump jack is a steel jack that sets over a well. The rod lines run from the power plant to the well. Occasionally they build 64 feet derricks to pump wells with. As to the cost of equipping a lease with the equipment necessary to produce oil, that would depend upon the depth of the wells, the depth of the holes, and the size of the hole; ordinarily, we will say, to equip a 1500 foot well, exclusive of the labor in drilling it, the cost would be somewhere in the neighborhood of $6,000.00. If the well were the deeper sort, say 1900 feet, it would cost probably 15 or 20 per cent more to cover the cost of equipping that sort of well. After that equipment is in there and is used one two or three years, the salvage value of the casing in the ground would vary; the casing pulling contractors in this territory will pay 30 cts. per foot, for 6-5/8 casing in the ground; or they will pay you this way, they do not pay for it in the ground, they pay you 30 cents for every foot they pull of it. They generally pull I should say 90 to 95 per cent of it; they lose some of it in pulling it; the second hand

tubing is worth about 20 cents; the rods, the
161 value is negligent, because they have been used 2 or 3 years, the boxing is worn so they are not fit to use afterward. The salvage cost would be about one-third of the original or new cost. I travel around over the ground and am in these oil fields and am familiar with the character of equipment, in a general way. I would not want to say that I am as familiar as any other one person might be; I would not want to make it that strong. My estimate of the lump sum valuation of the entire amount of the equipment used on and in connection with producing wells and leases in Wichita county of January 1st, 1923, is that it is bound to be in excess of four million dollars. It is true that one well, that might be used as an example, the equipment might bear a very very slight proportionate part of the percentage value of the producers' interest in the lease, and might be, say, one-one hundredth of one per cent of the value of the producers' interest in a particular lease, and there might be and would be in this county another well, or other wells, as to which the equipment might represent as much as 50 per cent, or more, of the value of the producers' interest in the entire lease; I think that is correct. Accordingly to my knowledge those facts are correct, they depend upon the size of the well and the amount of production obtained. There is no fixed relation as a practical proposition in the oil busi-
162 ness of the value of the equipment on the lease; it is only fixed by the amount of production and the depth of the production as compared with the cost. As to the cost of drilling wells in this (Wichita) county, that all goes back to the question of the size of the well you obtain after you drill it in; if you obtain a small well you do not equip it with a standard engine. A turnkey job on a well, drilled to 1500 feet, fully equipped,

would cost somewhere in the neighborhood of $10,000 or $12,000; those figures I just gave include the labor, added to the figures of the equipment, and the fuel, water and derrick. Now if that were a 1900 foot well the added per cent of cost to the figures I have given would be about the same ratio it bears as to the 1500; about the same proportion as the depth; about 20 per cent more.

In the past three years, the average market price, not the posted price of the pipe line company, but the average market price at which oil has been bought and sold in the past three years is about $1.72; that is about the figures we have in our office. That is not the average posted price, the average posted price is higher. The average market price covering the past three years is about $1.70. That represented the fair average price for the year 1923; in the first part of 1923 the oil rose from $1.40 per barrel to $2.60, the posted price in
163 April was reduced to $2.25 by the pipe line companies, and following that period the oil was bought and sold, and by refineries and contracts were made for prices considerably under the posted market price. During the period of 1923 the average prices obtained was somewhere around $1.50, unless contracts had been made based upon the posted market price of pipe line companies. On January 1st, 1923, it is a fact that $1.50 per barrel was a fair price for oil.

Cross Examination.

By Mr. Boone:

The market price for 1922 was not above $1.50; I don't think it averaged much above $1.50; for high gravity oil, 39 and better I do not think the average was above $1.50. There are four or five pools in Electra, it is generally

called Electra district; the district south of Electra is what is called the Waggoner properties, is known as the south Electra pool; that is high gravity oil down there; the shallow producers down there is below the top price oil, but the majority of the oil is the highest gravity oil produced in this district, and the highest price is paid for it. Having my attention called particularly to that pool, I would say the average depth of the wells in that pool is around 1600 feet. In order to drill and complete one of these wells, the operator would have to
164 expend anywhere from ten to fifteen thousand dollars to complete it, possibly $15,000 is a little in excess of what he would have to spend. I think a turnkey job would range from $10,000 to $15,000. Now, after a well—after he has expended that much money in drilling the well and the oil or the well producers, say three or four or five years pulled the casing, sell the tubing, pull the rods, abandon and sell the standard rig or derrick, sell every portion of the equipment on that lease, the price it would bring would be $2,000 or $2,200.00; he would then have a loss of the difference between what it cost and what it brought if he didn't use the material elsewhere, I am speaking of the salvage price. You ask me if those wells in the south Electra pool are drilled further apart than they are in the balance of the county, especially in the biggest pools, the northwest pool and the townsite pool. In answer will say, in the Electra pool it has been developed since the railroad commission of Texas has had jurisdiction of the drilling of oil and gas wells, and they require, I think in special instances, the drilling of wells 300 feet from each other, whereas that was not the case in the northwest townsite. The distance apart they usually average in the northwest pool and the townsite, two biggest pools in the county, is around 150 feet; I think it will average

that. You ask if in January, 1923, I was acquainted with the last Electra pool. I had been over
165 there a number of times, and gone through the field and made investigation of the possibilities of making some money over there. I cannot answer your question as to whether on January 1, the pools had not been defined. My impression is that the extent of the pool was pretty well defined on the 1st of January of 1923, that is in the first of 1923, there was possibly some small extensions made, but the producing area was pretty well defined in that period. It was defined but had not been drilled up. There was the same possibility of future oil being obtained from the well defined pools on January 1, 1923, as any other inside location. At that time the northwest pool and the Burkburnett pools had been fully drilled. There were no inside locations of any importance in any of the other pools, practically on January 1, 1923, northwest townsite, Burkburnett. You ask me if the oil and gas leases, as well as the royalties on the south Electra pool would be worth a great deal more than they would in the pool that had all of its locations filled up. I would say in answer to that: Not in proportion to the number of barrels, I would not say so, because sands in the Electra district are much more shallow, and the production hasn't been near as great in the Electra district as it has in the northwest field or townsite pool. The depths of the wells in Electra vary. I think the first well in the county was brought in near Electra in April, 1911. It is still producing, I think.

Those pools at Electra, some of them are long
166 life pools, some of them are not. I don't think, from indications, that that south Electra pool is a long life pool. I don't think it showed to be on January 1st, 1923; I don't think the present conditions down there would permit anybody to say that the pro-

duction would compare with the production of the northwest field. I don't know how long the production of the Burkburnett townsite will last; the engineers that have made statistics, the reports will show that. In addition to the expense of the operators, and the leases, the operator has to keep a pump man there at work all the time, and he has to continually draw the bug or rods out of the well to keep them in shape. He has to continually shoot them or clean them out; has to continually look after his tanks, his flow lines, pull rods, and everything on the lease, that is a continual expense.

Re-direct Examination.

By Mr. Barwise:

As to how much production, or lease, one man can take care of is a rather hard question to answer; we have to answer the question by example; we have one lease in the Carr district that has been drilled in the last three years one man looks after nine producing wells, he has his hands full; in some cases one
167 pumper looks after 20 or 30 wells. You ask me to state if I can whether or not the daily production of a well or wells may be even approximately arrived at, by a three months check or test of the runs. I will say that the large purchasers of producing properties in this district do not usually require more than a 30 day test to determine their views about the production on the lease; but that would not give any idea what the lease would produce during a period of 12 months; it could be determined in 30 days, I think you can determine the production on a lease very accurately. A thirty day rest would give a dependable idea of a well's production, but it does not reflect what the well may thereafter do, during the year, this because we have examples

of where for about the first day the lease guaged about 85 barrels, two months ago, that same lease is only making 51 barrels today, that is three months ago. As to whether it is the rule to expect a decline under the daily production as of a particular time, or an increase, it depends upon whether there is any new production, if there is no new wells drilled, or not a large amount of wells drilled, certainly the production would decrease almost daily.

Q. You say that the production arrived at today, for instance, by test of 30 days, is sufficient to determine what the daily production is today, but you say that will not reflect its future history; my point is, will that well invaliably or surely decline, or will it increase?

168 A. It will decline; the general condition always is to decline. You ask if I have any figures that will show or can tell you as to the standard or ratio of decline that may be expected in the wells of this county: I cannot answer that question, there are a great number of engineers' reports made on the various leases that could be obtained to give you that information exactly.

Re-cross Examination.

By Mr. Boone:

I would not say that 30 days is the usual and customary time within which to determine the market value of a lease, on sales and purchases, in this territory, some purchasers of production only take a 30 day gauge, in some cases they take 60 to 90 day gauges; I think the general average is 30 days. Yes, some of them take longer than 90 days; I have heard of them going over 90 days, but it is not common. And that is the basis upon which they purchase production. Unless there is some separate agreement, it is usually the case in purchasing

the production for all the equipment necessary to run the well to go with the leases. This one man who pulls the rods and tubes, he has to have teams and additional men to help him.

Mr. Barwise:

The test period you speak of, for arriving at the daily production, is that as to the flush production,
169 or is that figure you give as to the settled production?

A. As to settled production, usually.

R. L. MORE, witness for the plaintiffs, being first duly sworn, examined in chief by Mr. Barwise, testified as fo'lows:

My name is R. L. More; I am the general agent of W. T. Waggoner, and W. T. Waggoner estate, looking after his oil lease matters, and his tax matters and entire business that he does not have somebody particularly to look after, and that, in the man, constitutes my relationship to him, I have been connected with him in that capacity for about 20 years. I live at Vernon in Wilbarger county. As such agent of W. T. Waggoner I have charge of all his tax matters, and handle them almost exclusively, and I did have charge of and handle the tax matters involved here, in Wichita county, both for the rendition of the taxes, and the handling of those matters before the Commissioners' court. I am the R. L. More who made the rendition that has been introduced in evidence. I am familiar with that part of the
170 Electra oil field owned by Mr. Waggoner.

You ask me to state the instances or illustrations of wells and leases, as to the relationship of the

value of the equipment used in connection with the producing well and lease, and the value of the oil or amount of oil produced,—in other words, if there is any fixed basis of relation, and as to how those things vary and run. I do not know about the equipment of a well, that is out of my line, I never paid any attention to it, I see the flow tanks, flow lines, pump jacks, and power stations, is all. As to giving you examples of the amount of daily production, of leases that are equipped with the character of equipment Mr. Gwynne spoke of, you will find one well producing one half barrel, another 5 barrels, another one 500 barrels, on practically the same equipment. When I use that term I mean daily production; old wells in the old Electra field are down as low as one-half barrel, still pumping and some as low as a barrel, still pumping, some two barrels, then there are some making 500 barrels, and sometimes you find wells making 1500.

I did receive notice that the Commissioners' Court had raised the tax rendition made by me for the W. T. Waggoner estate, or W. T. Waggoner, for the year 1923; in response to that notice I appeared before the
171 Commissioners' Court and discussed that matter. You ask me to state whether or not I pointed out my reasons and whether I objected to it, to the rendition. I had rendered the land at $5.00 per acre. I considered it fit for nothing but an oil field, we were getting nothing out of it, possibly 10 cents per acre lease for the grass on it.

I think the land had heretofore been rendered
172 at 8 dollars, as long as we could use it for a cow ranch; I rendered it at $5.00 and they gave me notice why it should not be raised to $10.00. I agreed to that, but I objected to the price of the oil at $1000 per barrel; I rendered it at $450 and I objected to it at

$1,000.00, and they insisted upon the $1,000.00, I told them I would have to pass it up, I would not agree to it.

I had never been advised, as a matter of law, whether the royalty holder's interest was realty or personal property, or what character of property it was; I took it as personal property, the way they asked me to put it on the rolls.

I rendered the property the way I did at the instance of the assessor; he asked me to give the number of barrels, and the number of wells, or, rather, I say the assessor, maybe I got it in the shape of a letter, or maybe on the rendition blank itself. I was furnished a blank by the assessor upon which I made a rendition. In making that rendition I gave all the information that I understood was being called for; I did not know that it was wanted that each separate lease should be set out by itself, the number of wells on each particular lease, I could not have given the production that way, anyhow, if I had known it.

173 I am not able now, and have not been able at any time, to give the amount of production from each well; nor have I been able to give the amount of production from each lease. As a usual thing the oil company will have a battery of tanks sitting out there, and they may be pumping off of one lease on to a battery on another lease, when both leases belong to the same man, they may be pumping four or five wells into one battery of tanks.

The oil of the royalty owner is gauged into those tanks, and the royalty man is given credit for so many barrels of oil in that tank, then it goes into the pipe line. The flow tank belongs to the producer, then from there the oil goes into the pipe line, and the pipe line company takes care of it from there on.

In this county the Magnolia and Gulf have pipe lines, I do not know whether the Humble has or not, but the Texhoma has a pipe line; anyway, I will state, that it is not possible, from the manner in which the pipe line companies handle the oil, for me to give the production from any well, or from the separate leases, it is not possible from the producers standpoint, nor from the pipe line company's standpoint either. I will say, that,

174 some companies usually make a test about twice per year, they test each well separately, they designate a tank and pump out of this well into that tank, and then take the gauge; and they gauge each well about twice per year, to get what the well is doing.

All the companies to which the Waggoner oil is run do not make that test; the Waggoner interests run oil to just two companies in the years 1922 and 1923; there might have been some at one time run to the Texhoma company.

I will state that if W. T. Waggoner had any crude oil, above the ground, in Wichita county, on the 1st of January, 1923, I do not know it, I have been advised that there were about 3,000 barrels in the pipe line, but I do not know where it was; it was in the pipe line, that means storage or in the pipe line.

As to the average amount wells will decline in their production, I will state that in the first year, that decline would be about 25 per cent; from 15 to 20 per cent the second year, and from 10 to 15 per cent the third year, and practically 10 per cent per year thereafter. That is approximately the decline.

175 Mr. Boone:

10 per cent of the remaining 15 and 20 and 25 per cent?

Witness:
Yes, sir.

Mr. Barwise:
May we state, we made a tender before the suit was filed?

Mr. Boone:
Yes, sir; state what the facts are.

Mr. Barwise:
We tendered to the tax collector's department, really to Mr. Jones, because Mr. Bailey was not in town; the amount of taxes, having before us the data as to the amount claimed by the county; we tendered the amount of lands, as shown by the tax rolls, on the theory that we were entitled to pay that and have receipts. We tendered the whole amount shown by the rolls, excluding all of those oil that was on the rendition; we then tendered also the amount that would be owed assuming that we owed on the figure shown in the rendition of oil rendered for $325,000.00, at $450 per barrel; of course, we tendered on all the other personal property.

The Court:
I do not,—you mean you tendered on the 390 barrels?

Mr. Barwise:
On 723 barrels, at $450 per barrel.

176 Mr. Barwise:
There are authorities holding that a tender is not necessary, I presume that all of our friends on the other side recognize that the decree is collectible, but we will pay in the actual money, unless they waive it, we

will do that, and are perfectly willing to turn a check over to any of our friends on the other side.

Mr. Boone:
We waive that.

Mr. Barwise:
So our tender is kept good.

Mr. Boone:
Yes, sir.

I will state that I believed that the $325,000 valuation, as shown on the rendition, was the fair and reasonable value that that property right, or whatever it was, was worth, and I thought that was too high. I did not believe that that right, or property, or whatever it was, was worth more than that.

I am the man who exclusively had charge of handling that business, Mr. Waggoner had nothing to do with it, those are matters that I determine for him, and that was business that was left entirely up to me, representing Mr. Waggoner; as a matter of fact, Mr. Waggoner does not look after these tax matters, or the details thereof, but only looks to me.

177

Mr. Barwise:

We have an agreement to this effect: The test that was made, by which the 723 barrels of daily production as of January 1st, 1923, was made, and it is supported and sustained by the test described by the tax assessor, and that result is reached, was reached, and, would be reached, by using the average of the daily production for the period of December, November and October, and dividing that by the 92 days, in the way described by Mr. Deaton.

As to whether I can state the lives of the wells that were producing on January 1st, 1923, I will state that I have no record at hand by which I could tell, but I can get it for you; I have the Texas company wells, I could give you those, something like 216 of them, I think it is, the Texas company was the original wells in the Electra field.

I can give you a list of each and every well
178 that was producing on January 1st, 1923, and when it was brought in.

Cross Examination.

By Mr. Boone:

When I rendered those taxes in Wichita county I thought the royalty was personal property, and I still believed that when I was before the commissioners' court, because I wanted them to add up the oil and attach it to the land; I wanted them to assess the oil like it had been before, take the value of it and add it to the land as they had in the pervious years.

I did not give them the production on each tract of land; I do not know whether that question was raised or not, but if it had been I could not have told them. The Texas company had two or three surveys, maybe, of Mr. Waggoner's pumping into one battery.

I do not know how many wells were pumping on January 1st, 1923, I would have to look it up; I do not think more than 100 wells were drilled during the year
1923. The Texas company drilled something
179 like 44 wells. I do not know how many the Texhoma drilled, I can get that for you exactly. They drilled some dry holes, but not very many, my best judgment would be 10 or 15 dry holes. The lessees paid for the dry holes, that did not cost the royalty holder

anything. I do not know what the average cost of those dry holes are, that is out of my line I do not watch that end of it.

The total production on the Waggoner property in the year 1923, was around 1,000 barrels per day.

Mr. Barwise:

We would like that put in with our objection to it, as being immaterial and irrelevant, so that if it is not really relevant and material, we will not be bound by it.

The Court:

Alright, you may have the exception.

We sold all of the oil in the crude stage, sold it to the refinery; the refinery is a corporation, it is the Waggoner refinery. I think in some cases the lessees took the one-eighth of the oil, but they had to get an assignment for it; sometimes they delivered a credit sheet, take credit in the line, then they pay us for it.
180 We had to transfer them the oil before they would do it.

When a well is brought in the lessee is usually required to sign what is called a division order, so that one-eighth of the oil was run to our credit in the pipe line, the pipe line usually required that; and the oil was always our property until we transferred it, by transfer order, to the pipe line. The lessee had no authority or right to sell our one-eighth of oil to anyone, without a transfer from us.

Q. You retained your one-eighth of the oil under the ground and on top of the ground?

A. Well, we retained what we could.

Mr. Barwise:

The question of whether it is retained, under the ground, is a question of law, and we had rather not have the witness testify to it, that is, we do not want to waive

our right to have the Court pass upon the question of law.

Q. Did you ever sell to the lessee that one-eighth of the oil which was to be delivered to you in the future?

181 Mr. Barwise:

We consider that the same question we object to it.

The Court:

I will allow him to answer that.

A. We never sold any oil, only what was above the ground, and then by transfer, as I have described, the pipe line companies won't take it without a transfer.

I said when I rendered the taxes at $450 I thought that was too high for the oil. I do not know whether we got more than the $450 in the year 1923 or not, I have never made any figures on it; but we did not get 723 barrels off of the wells producing on January 1st, 1923. It is a fact that we owned the land upon which the additional wells were drilled during the year 1923. We bought no new land, and expended no more money to obtain the additional wells. We owned the property on January 1st, that we owned on December 31st, and the oil was delivered to us without any further expense by the lessee throughout that year.

On December 31st, 1923, the wells were producing something like 150 barrels more, average per day, than they were on December 31st, 1922; the production was around 900 or 1,000 barrels per day, one month with the other.

182

Re-direct Examination.

By Mr. Barwise:

When I speak with reference to the transfer of the oil, after it is produced, I will state what I mean by that; when we sell any oil to a refinery, or to anybody, we give a transfer order, which is nothing but a transfer to a pipe line company, so many barrels of Waggoner oil to such and such a refinery, it is a bill of sale; and I think that is the custom with all of them; that custom is not limited to W. T. Waggoner.

The oil is brought out of the well by the producer, and is put in the flow tanks first; it is gauged in those flow tanks, and turned to the pipe line company. It goes from the flow tank, which is the property of the producer, to the pipe line. In the flow tank it is gauged, and there is where the royalty owner gets his credit slip; as a usual thing it is the pipe line company, and they issue a slip for the royalty man and also issue a credit slip to the producer. The pipe line measures it, they have a gauger which comes along there and measures up the daily production at least every 24 hours. They measure, or gauge it, in the flow tank; it is gauged by the pipe line company and usually the royalty man
183 has a gauger on the job. As a usual thing the producer and the pipe line are so hooked up that they work backwards and forwards; on the Texas company lease, it is the Texas pipe line company, while there is supposed to be two different men, but the Texas pipe line company gauges it, and turns it over to the Texas gauger.

The oil goes into a general mass in the pipe line company, and is mixed and no man's oil is kept separate. It could not be. All a person has after getting this cre-

dit slip is a claim against the pipe line company of so many barrels of oil at such and such gravity.

L. H. CULLUM, witness for the plaintiffs, being first duly sworn, examined in chief by Mr. Barwise, testified as follows:

My name is L. H. Cullum. I live at 1704 Buckbannon, Wichita Falls. I have lived in this county since 1913. I am in the oil business, and have been since 1911; since 1917 I have been producing oil and drilling wells.

I own some oil properties in Wichita county, and am familiar with the various oil fields in Wichita
184 county, and have known them since 1913. I know the equipment that is required, and used, for producing oil. Since I have been in Wichita county I have worked for the Gulf company, from 1913 to 1917; I was in the land department, pipe line department, and producing and operating end.

I understood there were about 4,000 producing oil wells in Wichita county, on January 1st, 1923. I am familiar with the various kinds of equipment that go on oil wells to produce oil.

The Court:
Are the figures of Mr. Wynne challenged, Mr. Boone?

Mr. Boone:
No, sir, as to the cost?

The Court:
Yes.

Mr. Boone:
No, sir.

The Court:
I do not think this is necessary.

Mr. Barwise:
I do not think so, if there is no dispute.

Mr. Boone:
The figures as to the price of drilling wells is not challenged.

Mr. Barwise:
Average value of the equipment.

Mr. Boone:
Yes, sir; they are substantially correct.

185 Cross Examination.

By Mr. Boone:
I have been actively engaged in the oil business, since 1911, in Wichita county. I have not owned any royalty, but I have been a producer; I have considerable production myself.

Mr. Barwise:
As to these matters he is his own witness.

The Court:
It is somewhat out of order.

Mr. Boone:
I was trying to save time.

I know the usual expense incident to the keeping up of the working end of oil properties, after the well is

completed. I consider the royalty worth two for one of the production, in other words, if the production is worth $1,000 per barrel, the royalty would be worth $2,000 per barrel; it would depend, of course, on the piece of production you have under consideration.

I know the production in the south Electra pool. Some of that royalty in the south Electra pool is worth more than other parts, but I would say the production on the Waggoner properties is worth two for one; that is the royalty is worth two for one.

Some of the Waggoner properties were 12 years old on January 1st, 1923; and I think the royalty is
186 worth two for one, or, better.

Re-direct Examination.

By Mr. Barwise:

I will state that the proportion, that is, the relation, between the producer's part of the oil and the royalty owner's part of the oil, depends on the lease as a whole; one lease might have that relation and another lease joining it might have a different relation; that relation between the two would vary according to the different leases. I will state, that there are no leases where the royalty interests would not be worth any more than the producer's interest, the royalty would be worth more than the seven-eighths, that is to me; however, there is the variance that I have spoken of.

R. L. MORE, recalled, examined in chief by Mr. Barwise, testified as follows:

I will state that I was never present at any meeting of the oil men, where an agreement was reached between

the producers and royalty owners, as to the proportionate values. I have never made any agreement
187 with reference to that; I was not present, and did not have notice of any such meeting.

Plaintiff rests.

Mr. Barwise:

The plaintiff rests, with the exception of the data, we want to put in the record these figures that Mr. More will secure, at the noon hour, as to the lives of these wells.

Mr. Boone:

I do not know the procedure at this stage; I would like to make a motion, if it would not bar my right to put on witnesses, on the issue as to a discrimination. I do not believe the plaintiff has made his case.

The Court:

What do you think about his testimony here that this equipment is not taxed.

Mr. Boone:

That equipment goes with the lease. I forgot to ask Mr. Cullum, when he said, "two for one" that includes the equipment of the lease, "two for one or better."

Mr. Barwise:

I am not prepared to concede that that is a fact, I rather have a different view on it.

188 The Court:

Now, so far, I just give you this, the way it appears to me; it seems to me I would not be authorized,

as a Court, to interfere with such a basis of taxation as the state government and the county government, throughout this county has provided; I think that procedure was uniform and equal. Now, whether there is anything in the suggestion that there is a considerable amount of property, to-wit: equipment, that is not paid upon in this county, perhaps it would be well for you to put on testimony in regard to that, and such other testimony as you may think is necessary. The Court is ready to rule, in this case.

The Court:

I do not want it to be quite that broad. I made a pretty broad statement, I said I was ready to rule; the way it looks to me the Court's mind is toward you, I always want to hear all sides, and Mr. Barwise, I consider his views are always worth listening to.

Mr. Barwise:

There is one other fact I want to bring out from the assessor.

189 G. C. WOOD, witness for the defendants, being first duly sworn, examined in chief by Mr. Boone, testified as follows:

My name is G. C. Wood. I am in the oil business, and have been for about 24 years; I have been engaged in the oil business in Spindle Top, Sour Lake, Batson, Humble, Saratoga, Louisiana, and here in Wichita county, and Ardmore and Walters, Oklahoma. I have been both connected with large companies and also an independent operator. I have been both a royalty owner and a producer; I never owned any royalty, except in this country up here and at Batson and Humble.

I am acquainted with the south Electra pool on the Waggoner tract of land, I would say I have known that pool about 8 years. On January 1st, 1923, I was acquainted with the relative values of royalty and production interest, such as the Waggoner lands; I should judge, and it has always been considered, that the royalty was worth about twice per barrel of the working interest. The working interest, is the operating end of it, it is the interest that goes out and drills the wells and pays the bills; it includes everything that it takes to lift the oil out of the ground and get the well ready for production, derricks, pumping racks, power gas engines, all
190 the labor, and everything that goes with it.

In my opinion the reasonable market value of the royalty on the Waggoner lands on January 1st, 1923, as I knew the pool which was at that time making 723 barrels per day, I would judge the royalty was worth around $2,000 or $2,000 per barrel.

Cross Examination.

By Mr. Barwise:

In figuring the price per barrel of oil, a general average is not used to any great extent, oil men just "horse trade" like anybody else, they just buy it as cheap as they can and sell it for all they can get.

The price of oil for the last 6 years has averaged a little better than $2.00 per barrel; during the year 1923 oil might not have averaged over $1.75. or the year 1922 I imagine the average price of oil was about $1.50; for the year 1923 probably the average price of oil was about $1.75 or $1.70 per barrel.

If I were going out to buy the producers end in a piece of property, and also the royalty owners interest in the same piece of property, I would figure the royalty was

worth two or two and one-half times the producers end of it; the price of the oil on the market at the time doesn't cut much figure when you are buying
191 royalty, whether it is two or three or four dollars.

Examination.

By the Court:

When I say the royalty owners part is worth two or two and one-half as much as the producers part, I mean under the ground, of course, after it is on top of the ground they are both worth the same. When I say that I have to take into consideration what the producer has been out, sinking the well, tanks, derricks, piping, and everything he has to pay out in producing the oil; of course after the oil is on top of the ground it is worth the same.

W. D. HAMILTON, witness for defendants, being first duly sworn, examined in chief by Mr. Boone, testified as follows:

My name is W. D. Hamilton; I am in the oil business and have been about 8 years. I am a royalty owner as well as a producer. I am acquainted with the south Electra pool on the Waggoner tract of land.

I am president of the Texhoma Oil Company, and operating on the Waggoner lands. I was acquainted with the property south of Electra on the Waggoner property, on the 1st day of January, 1923.

I would say that on January 1st, 1923, the
192 value of the royalty interest as compared with the working interest, or lessee's interest, on pro-

perty like Mr. Waggoner's south of Electra, would be two for one. When I say that, I mean to say, that the royalty, per barrel, is worth about twice per barrel of the working, or producers, interest.

Examination.

By the Court:

I say that it is worth two for one; because of the cost of lifting the oil, because of the cost of general overhead of the company, operating it. And the money expended in attempting to find additional production, and for keeping up the wells that are there at the time; I would say in the Wichita area where we were operating our lifting cost runs from 30 cts. to $1.50 per barrel, which the royalty owner does not have to pay any of. In the lifting cost is included, the cost of the labor on the lease, the replacement of material worn out on the lease, the general operating part of the general overhead in our office; the insurance on the men, against accidents. The cost of the material in the well is not included in that, the cost of the casing, the drilling, fuel, water for drilling, the cost of the construction of the pumping
193 power, and lead lines, tankage, all of that would come in extra; that is after a well is already producing oil, in this area it costs from 30 cts. to $1.50 per barrel, it depends on the age of the well, the manner in which it is being lifted, etc.

Cross Examination.

By Mr. Boone:

Q. Now, Mr. Hamilton, is the material the expense of drilling the well, it has been testified to, and agreed to, the expense of drilling is $10,000 to $15,000, to a

depth of 1600 or 1700 feet; what salvage will the producer obtain from the cost, after the oil has been extracted from the ground?

The Court:
Well, would that be fair, in view of the admission, Mr. Wynne went into that.

Mr. Boone:
May I state my reason?

The Court:
I was just wondering if it would be fair to the other side, it might tend to raise an issue.

Mr. Boone:
I was under the impression I agreed to Mr. Wynne's figures as correct, and based it upon the ratio, after they had been used two or three or four years.

194 I will state what I included, when I stated it was worth two for one; in running over a period of years, the working interest, 7/8 interest, as compared to the one-eighth royalty interest, in this particular area, I would figure it to be worth from two or two and one-half to one, per barrel, based on the production; at least that much, and on that would be the cost of lifting the oil, general overhead, insurance, etc. I say that one barrel of royalty is worth two and one-half times what one barrel of the producer's interest is worth.

I will state that the age of the production, in the south Electra field, on Waggoner's land, on January 1st, 1923, would cause me to say that that particular royalty, in

the south Electra pool, was worth, $1400 to $1500 per barrel, that is actual value, not on a rendition value, but actual value at that date.

Cross Examination.

By Mr. Barwise:

I have been in the oil business 8 years, I think a valuation of $1400 or $1500 per barrel for the royalty holders part, in the south Electra field, would be a fair and reasonable actual value of the interest in 1923; and, I will modify my answer by saying, that the royalty, per barrel, on the old settled production would be
195 worth more than the royalty per barrel, on flush production, and taking it over the blanket area, and the blanket time that it would average it, it would be worth that. I will state that the value of the royalty in particular cases, or as to particular leases would vary widely, but taking over a period of time it will balance itself out on the basis of so much per barrel for the royalty over the whole area of Wichita county, it is more equitable way of arriving at it than trying to figure out one individual well, or individual lease in a district.

My company is primarily a producer, however we are refining, pipe lining, and marketers, as well, I will state that if a person were buying the royalty holders interest in a lease, and also the producers interest, in buying the producers interest, or 7/8, the purchasers would take into consideration, in figuring the value of the 7/8, the amount of equipment on the lease; of course the 1/8 would be figured differently, provided the lease was properly equipped for getting the oil.

However, I will state that the equipment on the lease does not add much value to the producers interest, because it is soon worn out, it is only a temporary value.

I would say that the amount of (ip- on a
196 lease in a depleted area, is an important item, but in an active area it would not make much difference. The price per barrel generally will take care of itself, as the wells decline, as they age the price per barrel is figured of course, because of the depletion, and there is a less amount of oil, and, hence, $1,000 per barrel or $2,000 per barrel, pretty well figures out the experience of the industry to that end.

The equipment of the lease is put there temporarily by the lessee, to be used only during the time that he is producing oil; and the lessee's contract generally gives him the right to take the equipment off whenever he abandons the property. If it is a rotary hole that he has drilled, he will pull very little pipe, practically none, his salvage on the rotary hole would be very small.

In a general way, however, I will state that the lessees, who are operating all these wells, themselves are the owners of the personal property of the lease, and they take it off and have the right to take it off whenever they abandon the property. The equipment that is taken off of an abandoned lease, has no very substantial salvage value, it might run as high as 50 per cent,
197 but that is not to be expected.

I do not know whether it is usually figured that your salvage will be about 35 per cent of the original cost or not, I have heard no one say, and I do not believe there is a definite amount settled in that at all.

It is a fact that the royalty owner has no part, or, interest, or, title whatever to the equipment; the lessee in most contracts, in this area, may remove his equipment.

The price I have given on the royalty of $1400 or $1500, I limited that to the south Electra field; I would say the old settled production at Electra is worth $2,000 per barrel royalty; and I think the price over the county

would average $1500 per barrel; I mean that, at the present time, there was a time, however, when the Burkburnett town site came in, when the northwest extention was in, when the royalty, based upon that flush production, would not be worth that much per barrel.

I think, Mr. Martin, the vice-president of our company was present at the meeting which has been spoken of, the purpose of which was to work out a plan for taxing the oil right in Wichita county of the producers and royalty holders.

198 D. O. JOHNSON, witness for defendants, being first duly sworn, examined in chief by Mr. Boone, testified as follows:

My name is D. O. Johnson. I am in the oil business, and I have been actively engaged in the oil business a little over one and one-half years. I have been in Wichita county, and acquainted with the oil business a little better than 8 years. I think I was acquainted with the relative values of the royalty holders and the producers end of the oil game on January 1st, 1923. At that time I was acquainted with the south Electra pool, in Wichita county, Texas, on the Waggoner lands.

As to the relative value of the royalty interest to the producers' interest, on January 1st, 1923, I will state; that, the royalty is always considered, in the Electra pool, better than anything else around in this part of the country.

In my opinion the royalty interest in that pool was worth about twice or three times as much as the producers' interest. I would say that on January 1st, 1923, in my opinion, the royalty interest on the Waggoner property in the south Electra pool, was worth in the neighborhood of $2500 per barrel.

199 Cross Examination.

By Mr. Barwise:

That was at Electra; I have never bought any, but I would like to get hold of some at that figure. I have never sold any, and never tried to. I have never bought any royalty anywhere else in the county, I have never dealt in royalties. I cannot give you the name of any personal who paid anything like $2500 per barrel for the royalty in the Electra field in the year 1923; I never heard of any royalty deal being made in south Electra. I know of no purchases or sales of any royalty interests in the Electra field.

I base my estimate of $2500, upon the fact that; there are several lease sales that have been made out in the Electra pool, and they were always higher than anything else, always brought more on a per barrel basis. I have known two or three wells out there that the property has brought in the neighborhood of,—the working interest,—$1500 to $2,000 per barrel. One sale that I remember in particular, in the Electra field, was the Bible property, the Magnolia bought the Planet, I do not recall, just at this time what the price was, I think it was three and one-half million dollars. I do not know what the daily production was on either one of those at the
200 time of the sale, only from hear say.

Re-direct Examination.

By Mr. Boone:

I remember the Griswell selling at $1600 per barrel, that was a working interest.

Re-cross Examination.

By Mr. Barwise:

There is always some undeveloped acreage that goes with these leases, when sales are made. The tract that the Magnolia bought had some undeveloped acreage; but I do not think the Planet had much, as well as I remember.

C. O. WALLING, witness for defendants, being first duly sworn, examined in chief by Mr. Boone, testified as follows:

My name is C. O. Walling. I am in the real estate and oil business, and have been in the oil business about 6 years. I live at Burkburnette, Texas.

I am acquainted with the reasonable market values of royalty interest in Wichita county, Texas, about January 1st, 1923; on that date the price varied, depending upon the location and the territory, it run from $1500 to $2,000 per barrel.

I know something about the south Electra
201 pool; I should judge the relative value of the royalty and producers interest on January 1st, 1923, run about the same, that is the royalty would be worth about $1500 or $2,000 per barrel.

Cross Examination.

By Mr. Barwise:

I was engaged in the business of buying and selling oil properties; I am pretty well acquainted with the oil producing lands in Wichita county, I have been on quite a lot of them.

In buying a lease that is producing, the basis that is used, is the settled production per day; in many instances the undrilled acreage on a lease is a large factor in determining the price of the lease, and then, in some instances it might not be a factor.

Q. We will suppose a case: suppose a case of 160 acre lease, one-half a mile square, that there is a well in the southeast corner, just the offset distance, and that well, it is producing 100 barrels, that is the settled daily production; now isn't it true that the selling price of that lease,—and over at the northwest corner, off of that, on the next piece of land is another 100 barrel well, just an off set distance, and on the northeast corner, and on the southwest is one, just beyond the offset dis-

202 tance; now, doesn't the amount of undrilled acreage on that 160 acre tract enter very largely into the price of that lease?

A. Well, Judge, I would think that would depend a great deal on the man that you were doing business with; that has been my experience; it depends on how easy he is, or how hungry he is for this lease.

I could not say on the point of how much undrilled acreage there is, whether that is a factor in the selling price or not, because there are so many different angles we figure.

Q. Now, isn't this true, that under the railroad commission rules and requirements, which you real estate men deal with more or less, it is assumed that one well will drain an area that is measured by a circle with a diameter of 150 feet, an area of a circle that is 300 feet in diameter?

A. 150 feet offsets, they call it, yes, sir.

203 B. E. SARTAN, witness for the defendants, being first duly sworn, examined in chief by Mr. Boone, testified as follows:

My name is B. E. Sartan. I am county judge of Wichita county, Texas, and have been 2 years at the end of this year.

I will state that during the first part of 1923, the commissioners' court did have a meeting for the purpose of determining the relative values of oil properties in Wichita county, Texas; I want to tell that; soon after I came in as county judge, in January, 1923, Mr. Deaton suggested to the commissioners' court that we should kindly inform ourselves as to the true values of oil properties, and the amount had only recently, probably a year before, gone in on the basis of barrels as a test of valuations of the lands and royalty interest in Wichita county. And, so, I called a meeting of the oil men of Wichita county, we met in the county court room, I suppose 75 or 100 men were present.

Mr. Barwise:

I think that is unnecessary, he may state what they did.

The Court:

Yes, I think so.

204 In valuing the properties, we took into consideration the working interest, the property, and the lease equipment, which we threw in, making it $450.00 per barrel; we found out, in the percentage of ratios, of course, that the royalty was worth a good deal more than the working interest; some said two to one, some said two and one-half and some said three,

but we figured something like two and one-fourth and that was even suggested both by the royalty men and the producers as a fair ratio.

Mr. Barwise:
We object to that.

The Court:
Sustain the objection to that, and strike that from the record.

Mr. Boone:
We except.

Q. Did you leave the personal equipment that is necessary to operate the lease off of the assessment rolls?
A. No, sir, we did not leave it off, we merely included it in the $450.00 per barrel, because we considered that the ration was just when was was considered.

Mr. Barwise:
We object, because the rolls would be the best evidence of that.

205 The Court:
Yes, I sustain the objection, but I will allow him to say what he considered in the $450.00.

Q. What did you consider in the $450. valuation?
A. We considered the working interest, plus the working equipment, the lease equipment.
Q. Are you acquainted with the reasonable market values of leasehold estates, of such property as the Waggoner south Electra pool, on January 1st, 1923?
A. I think so.

Q. What, in your opinion, was the leasehold estate, including the necessary equipment?

Mr. Barwise:

We object to that, as being irrelevant and immaterial.

The Court:

Well, he is a member of the board who makes these figures.

Mr. Boone:

The reason I asked about the investigation, a person can acquire knowledge of reasonable market value by investigation as well as by actual dealing in it; now I seek to show by this witness that the reasonable market value of the working interest, including the necessary equipment on the lease was a certain figure, that is, what it could have been sold for on the market, then the next question, what was the reasonable market value of the royalty in question.

The Court:

I overrule the objection and give the exception to the plaintiff.

206 I will state that the reasonable market value of the leasehold estate, or working interest, including the equipment, on January 1st, 1923, I consider that property, in Wichita county, on the market was worth, at least double the amount we put it on the tax rolls for; in other words, that the working interest at that time could easily have been sold for double the amount of, say, $450.00.

We considered the reasonable market value of the royalty on those tracts, about $2,000 and we placed the tax value at about $1,000.00.

At the time we raised the rendition of these various tracts of land we sent notice to each personal whose rendition was raised.

At the time the rendition was made by Mr. Moore, I did not know the respective amounts of oil that was being obtained from the different tracts of land in these renditions; the rendition was given as a lump sum.

Q. If he had not rendered it in a lump sum, you then, acting as county board of equalization, could have gone into it and heard testimony, and taken testimony and obtained what the production was on each tract?

207 Mr. Barwise:

We object to that, because it is irrelevant and immaterial.

The Court:

Yes, I think the statute covers it anway.

Mr. Boone:

There is an issue of estoppel, that if he had not have rendered it, that then they would have gone on and assessed it correctly, but having rendered it in the manner that he did render it they make the assessment as he rendered it.

The Court:

I do not want to get anything in here that should not go in, however I do not want to keep anything out that should go in. I want to decide this case on the one big question. I will allow the witness to testify what his rule is, what course they pursued, I think that is as far as I ought to allow it.

Mr. Barwise:

May I make the objection now, so that we will have it, without having to interrupt. We object to any and

all evidence with respect to the issue of estoppel, on the ground that it would be irrelevant and immaterial; because the evidence already in the record from the tax assessor conclusively and affirmatively discloses that there could be no estoppel.

208 The Court:

I will admit it, or I will merely allow the defendant to show, by this witness, if he can, what was done.

I will state that, of course, we demand of every producer or royalty owner to turn in the list of his number of barrels, on his particular tract. We do that to arrive at the true value of the land; if they do not furnish us with that information we are, of course, forced to use whatever means are at our power; we get the Comptroller's report at Austin, of how many barrels were turned in there, and that would ordinarily disclose the tract on which the production is given. In this instance, we just had his lump sum, and we know that belonged on a particular tract, because that was the only tract he had. In other words, we make the best investigation we can.

After this rendition came in, of course, we took took the Comptroller's report and checked up to see if he had given us the correct number of barrels, for the period stated, by which we got our average barrels for January 1st. We made no investigation with reference to what tract or tracts it went upon.

I remember when Mr. Moore came before the
209 board, I was present, and I remember where he sat, he mentioned the fact that we had it up to $1,000 per barrel, we told him we followed the same rule to him and Mr. Waggoner that we did to the other

interests in Wichita county, and he suggested that we let him off for $450.00, and we told him we considered he was already off easily 50 per cent, and we played no favorites, made the same rule apply to all; he says, "Thank you gentlemen", and got up and smiled and left.

Cross Examination.

By Mr. Barwise:

It was a very weak smile, but he smiled and left.

The commissioners' court of this county, as the board of equalization, use for tax purposes of personal property, the value of about 50 per cent, I should judge; in none of it did we intend to exceed the value of 50 per cent.

In valuing the land, where the land was practically worthless, except for oil purposes, we put the value of the land at a nominal value, about $10.00; some of it 7 or 8, or 5 dollars, probably. The basis for the value of the lands of the county generally is about 50 per cent.

I rather think that land and personal property
210 values in the county are under 50 per cent, but they are on just about the same basis as the oil. I believe the tax value would be nearer 40 per cent. than 50 per cent, in some cases property here has fluctuated so that in Wichita Falls, and around some of the other town in the county, it is hard to get the value.

As to bills and notes, and things of that sort, it has been pretty difficult to catch those things, they are hid, or concealled in such a way that the county has never been able to catch many of them. It would be a guess as to the amount of notes, or the per cent of notes and money that we catch for taxes, but I would say one-fourth would be a high guess as to that amount.

When a man has a claim against somebody for money, or a contract under which he has bought something, and, in which there is a substantial profit, we tax those when we can get hold of them, but I doubt whether we have been able to catch any money, or those things, where they can be concealed, because people are loathe to give anything they do not have to for taxes, and you almost have to hold them up with a gun if you catch any notes or money or things of that nature. Of course
211 the assessor gets a list of all property, and we try to catch all the property we can, but, to be frank, with you, I don't think we catch it, I do not think any of the counties in Texas do.

Of course the rendition of the property is left up to the tax assessor, in all cases, and that is a matter for the assessor, it comes under him, and he is supposed to bring in the list of all the stuff that a man has, sworn to by the man, and we take their word for it. The Court has not adopted any plan to find out the different things to be taxed, except what instructions they have given to the assessor. I will say this, that we have secured a good deal of notes and money, but I do not think it is all that justly belongs to Wichita county, but when we put them under oath and swear them to it, and do not have any further proof, of course, what can we do, that is all we can get out of them.

212 IRVAN DEATON, recalled, examined in chief by Mr. Boone, testified as follows:

Q. Since this suit was filed, have you, under the authority of the statute made a supplemental roll, for the property of W. T. Waggoner?

A. Yes, sir.

Q. Have you that there?
A. Yes, sir, I have.

Mr. Boone:
We offer that in evidence.

213 Mr. Barwise:
We object to that evidence, it is irrelevant and immaterial and incompetent for any purpose, because, the only purpose for which it could be used, the only effect it could have in this suit would be to sustain the contention that the plaintiffs owed taxes, other than, or more than, those set up on the regular rolls that are made up from the renditions that went before the Commissioners' court as a board of equalization and then went on the tax rolls. That this Court may not assess the property or pass upon the assessment of property, or pass upon the rendition, that this Court exercises a judicial function, that the taxation of the property is a function within the legislative branch, and by administrative bodies, and this Court can neither determine whether there is any additional tax, except as appears on the tax rolls and taxes that have been regularly rendered, assessed and passed upon by these bodies. So that, under the law, and even though it be true that the Waggoner lands are subject hereafter to reassessment, because of the lands not having had distributed among them, or included within them, this value, that is now claimed should have constituted a part of the land, even so, this Court cannot avail itself of it, and that question is not
214 available here, that that remedy, if if open at all, is still open, and may be later pursued in the regular course. Moreover, even if this Court had the power now to pass upon these matters of the assessment of the property and the renditions and valua-

tions, and substitute its functions for the functions of the tax assessor, and the county commissioner's court; the objection is made further, that the action already taken, and in which these values upon the lands have been fixed are conclusive and the commissioners' Court having acted upon it, and have from the rolls made demands for the taxes, their action, by force of the statute, direct statement of the statute of Texas, is that that action is final and conclusive. And, while we recognize that one of the three basic principles, one of the three great reasons for the courts of equity was to relieve against fraud or mistake, that it may not be done in this way and in this fashion. In order that the Court may have the benefit of our views about that we urge those objections.

The Court:

I think that was substantially the Court's observation at the beginning of the trial, and in this case the plaintiff moves for relief, the Court neither grants it or does not grant it, I do not see how you are helped or hurt, Mr. Boone, by it, if you can tell me.

215 Mr. Boone:

After looking the case up I am afraid of the pleadings as they stand, which allege that we put it upon the personal property roll, the testimony shows that we did, when in truth it is real property and should have been placed upon the real property roll rather than the personal property roll. Now if the case should be appealed by either party, the higher Court will say, here is real estate taxed contrary to the statute, it is not on the proper roll, and you cannot assess it, you cannot collect it, because it is not where the law said it should be put. Now it is true that we can do this after it is over with,

but then the higher Court will not know that we have done it before the decision of the lower Court has been reached; in other words under the authorities we have the right to correct any mistake made in the record of the tax proceedings during and in an injunction seeking to prohibit the parties from collecting the tax.

The Court:

I will give Mr. Barwise an exception temporarily.

Mr. Boone:

I am not asking your Honor to issue an order permitting us to correct a record, neither am I asking your honor to allow or permit us to do that; I am asking you to allow us to prove that previous to the trial of
216 this lawsuit we corrected the roll, under the statute, which we have the right to do.

Mr. Barwise:

We make the additional objection that that may not be done after the litigation is initiated, to prepare a record to sustain them when they get into Court.

Mr. Boone:

The statute permits us to do it.

Mr. Boone:

We offer in evidence, the supplemental roll: (as follows):

217 FORM C. SUPPLEMENTAL ROLL.

Assessment Rolls of Property in Wichita County, Owned by Non-Residents and Rendered for Taxation for the Year 1923.

Owner: W. T. Waggoner, Ft. Worth, Texas.

Abst. No.		Original Grantee	Acres Rendered	Value
13		J. Bradley	293	2110
553		F .J. Cook	33	230
455		A. Gobson	1280	10240
533		S. Holloway	287	2330
803		M. M. McLauren	38	250
393		Seale & Morris	647	5180
535		Seale & Morris	453	3260
531		G C & S F Fy.	300	2430
731		G C & S F Ry.	297	2430
530		G C & S F Ry.	717	1390
738		G C & S F Ry.	159	1290
586		G C & S F Ry.	488	3900
606		G C & S F Ry.	225	1820
137		H T & B R R Co.	640	5120
505		H T & B R R Co.	384	3070
716		H & T C R R Co.	76	540
110		H&TC Ry.	300	2160
	771	H & T C Ry.	640	4610
218	109	H & T C Ry	646	4660
	761	H & T C Ry	476	3430
790		H & T C Ry.	9	70
788		H & T C Ry .	40	290
160		H & T C Ry.	611	4890
108		H & T C Ry.	618	4450

Abst. No.	Original Grantee	Acres Rendered	Value
482	H & T C Ry.	640	5120
105	H & T C Ry.	650	4680
392	H & T C Ry.	354	2860
800	H & T C Ry.	250	2030
688	H & T C Ry.	8	70
122	H & T C Ry	95	770
784	H & T C Ry.	640	5120
569	Tex. Central Ry.	141	7000
632	Tex. Central Ry.	68	550
	Mineral		723000
	Total	11957	821350
Value of Personal Property			5300
	Total Value		826650

State Taxes	6199.88
County Taxes	6613.20
Dist. School Taxes	684.50
Total Taxes	$13497.58

219 This exhibit which you hand me is the supplemental roll that we have prepared in accordance with the statutes of Texas.

Q. What difference, if any, is there in this second roll and the one prepared by you in 1923?

Mr. Barwise:

We object, because it will show.

The Court:

Yes, I think it will show the facts.

Cross Examination.

By Mr. Barwise:

I could not say the exact date when this was made up, but it was somewhere about the 1st of February. I do not remember how long after the suit was filed that we made this roll, but not very long, anyway, as well as I can remember, it was after the suit was filed.

We made this up under the advice of counsel that this was the proper procedure to take; it was changed when the question was raised. The property was rendered to me as personal property to start with. I was advised by our lawyer in the case that this was the proper thing to do, I was requested to do that, by the Commissioners Court and by Mr. Boone, the attorney.

220 In the amended roll, I list all of the 10 or 15 tracts of land, and then follow that with the lump sum, item of minerals, I call it, of $723.00; I have not assigned that lump sum to the various tracts that produce oil at all. I did not do that because I did not have the information.

R. M. MORE, recalled, examined in chief by Mr. Boone, testified as follows:

My understand was that you wanted a list of the wells producing during the year 1923, including everything that was brought in before 1923 and in 1923. There were 143 producing wells in 1923, and 5 dry ones, in 1923.

Mr. Barwise:

We have the date of the bringing in of each well, and the initial production, we have those all tabulated, and will furnish it in evidence:

(Said exhibit reading as follows):

221 EXHIBIT "30."

State—Texas; County—Wichita; Field—S. Electra; Company—Texhoma Oil & Ref. Co.

Lease name: W. T. Waggoner—Lese. "F"
Date—12-26-23.

Description: Being the East 18.81 ac. of the S. E. 40 ac. of Sec. 33, H. & T C R R Co. Sur. block 5—Acres —18.81.

Royalty: 1/8 share of working interest owned; 7/8.

Well No.	Completed.	Ini. Prod.
1	4/23/23	52 bbls.
2	5/18 23	55 "
3	5/12/23	60 "
4	6/ 2 23	148 "
5	6/21/23	97 "
6	7/12 23	130 "
7	7/15/23	54 "
8	7/15 23	63¾ "
9	9/27/23	187½ "
10	11/12/23	120 "
11	12/ 5/23	87½ "

222

Gross Production.

1923.

April	273
May	2385½
June	6406½
July	8840¾
August	11198½
Sept.	9587
October	12492¼

Texhoma Oil & Refining Co., South Electra Field.

W. T. Waggoner, Lse. "E". Date: 5/19/23.

Description:

The west 20 ac. of the S. E. 40 ac. of the S. E. 160 ac. of sec. 33 H. & T. C. R. R. Block 5. Acres—20.

Royalty: 1/8 share of working interest owned: 7/8.

Well No.	Completed.	Ini. Prod.
1	1/27/23	140 bbls.
2	2/27/23	250 "
3	3/11/23	750 "
4	3/ 9/23	170 "
5	3/28/23	130 "
6	4/18/23	325 "
7	3/24/23	40 "
9	4/24/23	72½ "
10	4/28/23	80 "
223 11	5/16/23	342 "
12	2/23/23	169 Swab. bbls.
13	6/14/23	50 Flow. bbls.
14	7/ 2/23	212½ "

Gross Production.

1923.

February	3151
March	28233
April	26832
May	43209½
June	40064
July	40286
August	34349½
Sept.	31513¼
October	28652

224 Shamrock Oil Company—W. T. Waggoner, 42 Acre Lease Electra.

Well No.	Completed	Production.	
1	5/20/22	460	bbls.
2	6/27/22	150	"
3	6/30/22	250	"
4	7/ 2/22	125	"
5	7/19/22	50	"
6	8/ 5/22	325	"
7	7/28/22	185	"
8	2/15/23		
9	11/ 3/22	25	"
10	12/18/22	dry.	
11			
12	3/ 8/23		
13	3/ 4/23	50	"

225 Defendant rests.

Mr. Barwise:

We introduce in evidence the tax rolls, showing that the W. T. Waggoner rendition, a copy of the assessment rolls of the property as finally made by the commissioners Court and approved by the Court, and delivered to the tax collector, being a copy of the original rolls in the possession of the assessor, upon which the county and the collector are seeking to collect and demanding taxes of W. T. Waggoner, and the W. T. Waggoner estate for the year 1923. It being shown at the bottom four-fifths of page 383, of the non-resident tax rolls, and designated as Form C.

The Court:

What does it show?

Mr. Barwise:

It shows, or starts out with these lists of these surveys, after setting out all the land, it shows here, under the column that is headed "Value of Personal Property," shows "$728,300," is the item arising from the oil, following some personal property of the sum of some four or five thousand dollars.

On the tax records of Wichita County is shown the lands of W. T. Waggoner, and the assessment of the real estate, personal property, and the oil, etc., as shown by the following exhibit attached hereto and designated as Exhibit No. ..... and is as follows, viz:

226 Owners: W. T. Waggoner,
P. O. Address: Ft. Worth, Texas.

Abst.	Original Grantee	Acres Rend'd	Value
13	J. Bradley	293	2110
553	F. J. Cook	33	230
455	A. Gibson	1280	10240
533	S. Holloway	287	2330
803	M. M. McLauren	38	250
393	S. & M.	647	5180
535	S. & M.	453	3260
531	G C & S F	300	2430
731	" "	297	2430
530	" "	171	1390
738	" "	159	1290
586	" "	488	3900
606	" "	225	1820
137	H T & B R R	640	5120
505	" "	384	3070
716	H & T C Ry Co	76	540
110	" "	309	2160
771	" "	640	4610
109	" "	646	4660
761	" "	476	3430
790	" "	9	70
788	" "	40	290
106	" "	611	4890
108	" "	618	4450
482	" "	640	5120
105	" "	640	4680
392	" "	354	2860
800	" "	250	2030
688	" "	8	70

122	" "	95	770
784	" "	640	5120
569	Texas Central	141	550
632	Texas Central	88	7000
		11944	98350

Personal Property	State Taxes	Co. Tax		Dist School	Total Tax
28300	6199.88	6613.20	5	684.50	13497.58

227 Mr. Barwise:

May I state the various lessees named in the lists that have been introduced in evidence, by the plaintiff, or assignees of the original lessees are in possession of those leases respectively, and that none of those leases were, on January 1st, 1923, nor have ever since been forfeited and have not reverted.

Mr. Boone:

That is correct, they were operating those leases under the terms of their leases.

It is agreed, that, W. T. Waggoner resides in Tarrant County, Texas, and that the Waggoner Estate, is a trust estate, the owners of which are the three Waggoner children, no one of whom reside in Wichita County, and have never resided in Wichita County, Texas.

228 We agree that the foregoing is a true and correct and complete statement in narrative form of the testimony and evidence introduced in said cause, and that the several exceptions taken to the Court's

rulings and which are set forth in the foregoing statement are true and correct, and said exceptions are hereby agreed to and approved.

Signed and agreed to this the 11th day of June, 1924.

JOE B. CARRIGAN, and
THOMPSON, BARWISE & WHARTON,
Attorneys for Waggoner Estate et al.

T. R. BOONE,
Atty. for Wichita County, Texas, and other defendants.

229 Come now plaintiffs in the above styled and numbered cause, and appellants herein, and present this, their statement of the evidence, and ask to have same duly allowed, settled and signed as and for the statement of the evidence and proceedings in said cause at the trial thereof and as containing all evidence material to the hearing of the appeal in said cause.

JOE B. CARRIGAN, and
THOMPSON, BARWISE & WHARTON,
Attorneys for Appellants.

The foregoing statement of the evidence having been agreed to by the counsel for the respective parties, and it appearing to the Court that the same is stated in a simple and condensed form in accordance with the rule, and that the same contains all parts of the evidence essential to the decision of the questions presented by the appeal, leaving out only such parts of certain exhibits as are immaterial and would be merely a duplication of parts of instruments fully set out, and it further appear-

ing that said statement is a true, complete and properly prepared statement of the evidence adduced on the trial, and of the proceedings had on the trial.

It is therefore ordered that the same be and is hereby approved, settled and allowed as a true, complete and correct statement of the evidence introduced in said cause and the proceedings had in said cause during the trial, reduced to narrative form, as required by Rule 75 of the Equity Rules.

This, the 17 day of June, 1924.

WM. H. ATWELL,
United States District Judge.

---

230 PETITION FOR APPEAL.

Filed Apr. 11, 1924.

Comes now the plaintiffs and each of them, in the above entitled and numbered cause, and show that heretofore they have excepted to the judgment and decree of the Court herein, and stated in open Court that they desired to appeal from said judgment and decree.

Therefore, now come your plaintiffs herein and with respect show that they feel aggrieved herein, and respectfully pray and ask that they be allowed an appeal herein, and be given such time in which to perfect the same as this Court deems proper.

JOE B. CARRIGAN, and
THOMPSON, BARWISE &
WHARTON,
Attorneys for Complainants.

ORDER ALLOWING APPEAL.

Entered April 11, 1924.

In the above styled and numbered cause, the plaintiffs having in open Court excepted to the judgment and decree of the Court herein, and having made application for appeal herein,

It is therefore ordered, adjudged and decreed by the Court herein, that the plaintiffs and each of them be granted and allowed an appeal herein to the Fifth Circuit Court of Appeals, Fifth Circuit, and it is further,

Ordered, adjudged and decreed by the Court, herein, in term time, that the plaintiffs have 45 days from the adjournment of this Court in which to prepare and perfect their appeal herein, and it is so ordered.

WM. H. ATWELL, Judge.

---

231 ## APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE TRANSCRIPT.

Filed 3 day of June, 1924.

Come now the plaintiffs herein and with respect show to the Court that heretofore, to-wit, on April 11th, 1924, and at the time of the announcement by the Court of the decree entered herein dismissing the bill of complaint of plaintiffs, and on application, were granted leave of this Court to appeal this cause to the United States Circuit Court of Appeals, and were allowed sixty days

from the date of said order within which to file the record, and plaintiffs would further respectfully show the Court that it has been impractical to make up the record of this date so that same may be filed in the office of the Clerk of the United States Circuit Court of Appeals at New Orleans within sixty days from April 11, 1924, and that they have presented to the Court proper petition for appeal, which has been by the Court allowed, and that they have also presented citation on appeal, which has been signed by the Court on the 3rd day of June, 1924, and which permits, in accordance with the equity rules and the law the record to be filed within thirty days from the date of the signing of said citation.

Plaintiffs now therefore pray that an order be entered whereby the time for filing said record as originally granted be extended to such time as will allow the full period allowed by law from the date of the signing of citation on appeal.

Respectfully submitted,
JOE B. CARRIGAN,
THOMPSON, BARWISE &
WHARTON.

Come now the attorneys for defendants in the above cause and agree that order may be entered in accord with the foregoing petition and that the time in which to file the transcript in the Court of Civil Appeals at New Orleans may be extended in accord with said petition, provided only that the time of taking the appeal shall not be extended or delayed beyond the period of six months provided by law for taking an appeal in such cases, and it is understood the time for filing the transcript in the Court of Civil Appeals shall be extended

until the expiration of thirty days from the date the Court signs the citation on appeal, subject to the above proviso.

T. R. BOONE,
Attorney for Defendants.

---

232 ORDER GRANTING EXTENSION OF TIME.

Entered June 3, 1924.

There was presented to the Court on this the 3 day of June, 1924, an application of the plaintiffs herein setting forth that on April 11, 1924, the date of the decree of this Court dismissing the bill of complaint, an order was entered granting plaintiffs leave to appeal this case to the United States Circuit Court of Appeals; that at the same time the Court then entered an order granting sixty days from the date of said decree within which plaintiffs might file the transcript of record herein, and plaintiffs pray in said application for an extension of said time within which to file said record for an additional period of time as heretofore granted, and it appearing to the Court that the said petition should be granted,

It is therefore ordered by the Court upon good cause shown therefor that the said sixty days heretofore allowed by order of this Court for the filing of the record be, and the same is now enlarged so that the said plaintiffs are now granted thirty days from the time the citation on appeal is signed in this cause within which to file their record herein.

WM. H. ATWELL, Judge.

233 ASSIGNMENT OF ERRORS.

Filed June 3, 1924.

On this the 3rd day of June, 1924, come now the plaintiffs, W. T. Waggoner and W. T. Waggoner Estate, by their solicitors, and file this their assignments of error, and say that the decree in this said cause dismissing their Bill of Complaint and the holding of the Court herein is erroneous and against the rights of the plaintiffs herein and each of the, for the following reasons:

I.

Because the Court herein erred in dismissing the complaint herein of the plaintiffs, for the reason that under the undisputed evidence and facts in this case the complainants jointly as well as severally were entitled to have a decree entered in their favor, and the Court therefore erred in holding against the plaintiffs herein and each of them and in rendering a decree against the plaintiffs herein.

II.

Because under the undisputed facts in this case the said plaintiffs and each of them herein, jointly as well as severally, were entitled to the relief prayed for in their Bill of Complaint on which they went to trial, and the Court therefore, under the undisputed facts in this case, erred in rendering judgment against your plaintiffs herein and each of them and erred in dismissing the Bill of Complaint herein.

III.

Because the Court in this case, in dismissing the petition and bill of complaint of the plaintiff herein on which they went to trial, and in holding that they were not entitled to the relief prayed for, and in holding that the plaintiffs herein were liable for the tax they sought to enjoin, erred for the reason that under the undisputed facts herein said plaintiffs were not liable for said tax, and the Court erred in holding and decreeing that they were, and in dismissing the Bill of Complaint.

IV.

The Complainant and pleadings of the plaintiffs on which they went to trial in this case showing and stating a good cause of action against the defendants herein and showing plaintiffs were entitled to the relief prayed and asked for in their said pleadings, and this being true, and the answer of the defendants showing on
234 its face that said answer and pleadings of the defendants stated no defense to the cause of action asserted by the plaintiffs, and this appearing from the defendants own pleadings, that is the defendants' own pleadings showing that they failed to state a defense to the plaintiffs' cause of action, therefore the Court herein erred in dismissing the plaintiffs' bill of complaint, and erred as a result thereof in failing to render judgment for the complainant herein.

V.

The undisputed evidence in this case showing that the plaintiffs, by leases duly made and executed, in every

manner and way had conveyed the minerals including the oil and gas and all other property involved herein, and it appearing that said minerals including oil and gas had been conveyed by the plaintiffs to certain parties for a long period of time, and it appearing from the undisputed evidence that the plaintiffs' lessees were in charge of said minerals in every manner and way, and it appearing that this was true prior to and at the time the defendants undertook to levy the tax in question and to tax the minerals to the plaintiffs, and these facts being undisputed the Court herein erred in rendering judgment against the plaintiffs herein, and erred in refusing to give them the relief prayed for and erred in dismissing the bill of complaint, for the reason that said property involved having been leased for a long period of time to the plaintiffs' lessees, said property in every manner and way, including the minerals thereunder, became assessable and taxable against the lessees and not against the lessors herein, to-wit, the plaintiffs herein, therefore the Court erred in dismissing the bill of complaint herein and erred in refusing to give the plaintiffs the relief prayed for.

VI.

Under the laws of Texas and the decisions of the Supreme Court of Texas construing the laws of Texas, mineral rights including oil and gas in land in place constitute part of the land and is subject to complete severance from the surface rights and the land owner may by instrument in writing effect a complete severance and disposition of the mineral rights, therefore, this being true and the plaintiffs herein and the said W. T. Waggoner having by proper instruments in writing

effected a complete severance of the mineral rights in and to the property involved thereafter had no interest or title in and to such mineral rights except a possibility of revertiture which could only be brought about by the faiure on the part of the lessees in said instruments to comply with the terms, covenants and con-
235 ditions of said instruments, and the undisputed evidence showing that at the time the tax was attempted to be imposed upon the plaintiffs herein that they had by valid leases effected a complete severance of all their interest in the mineral rights, and the undisputed evidence showing that no act of forfeiture had been committed by the said lessees at the time the tax complained of was levied against the plaintiffs herein, it is therefore apparent that the plaintiffs at the time the tax in question was attempted to be levied against them, and at the time they were assessed and taxed, that the plaintiffs at said time held no such interest as was subject to taxation, hence the Court erred in holding to the contrary and erred in dismissing the bill of complaint herein.

VII.

The undisputed evidence in this case showing that the plaintiffs at the time the tax in question was attempted to be levied and assessed against them, and prior thereto, had by written leases conveyed all the minerals in and under the land in question to certain lessees, said leases or instruments giving the plaintiffs a certain royalty in any minerals that might be produced or found after being severed by the lessees in said instruments; therefore, this being true, these facts being undisputed, and the undisputed evidence showing that the leases made by the plaintiffs at the time the taxes were attempted

to be assessed herein were valid and subsisting leases and had not been forfeited in any manner or way, and had been complied with in every respect by the lessees named in said leases; therefore, the plaintiffs at the time in question had no such interest in said land or minerals as to be taxed against the plaintiffs herein in the manner and way as attempted to be done by the defendants herein; therefore, the Court herein errred in dismissing the bill of complaint.

VIII.

The undisputed evidence in this case showing that the plaintiffs, including W. T. Waggoner, at the time the tax in question was attempted to be assessed against them and prior thereto had by written instruments in every manner and way conveyed to certain lessees all their mineral rights in their lands in Wichita County, Texas, said leases and instruments in writing providing that the said lessees, if they found oil under said land, that they would deliver to the plaintiffs a one-eighth part thereof, and the undisputed evidence showing that at the time the tax in question was attempted to be assessed against the plaintiffs herein and each of them that said leases were in full force and effect and had not been forfeited in any manner or way by the lessees therein named, and these facts being undisputed
236 the Court therefore erred in rendering judgment against the plaintiffs herein, and in dismissing the bill of complaint, for the reason that said minerals were conveyed absolutely by the said plaintiffs to said lessees, and which plaintiffs had the right to do under both the state and federal law, as construed by both the federal and state Courts; and, plaintiffs having

conveyed all said mineral rights in said land to the said lessees named in said leases, therefore the title to all the said minerals passed out of the plaintiffs, and the mere fact that the plaintiffs were to get a one-eighth interest or royalty out of any oil the lessees might have found and severed did not leave or put in the plaintiffs such an interest or title in land or royalty as to be assessable and taxed against your plaintiffs, but that the same, that is the whole, became taxable against the lessees and not against the plaintiffs herein; therefore, the Court erred in holding as it did and erred in dismissing plaintiffs' bill of complaint herein.

IX.

The Court in this case erred in holding that under the leases in question that the plaintiffs did not sell anything except seven-eighths of the minerals in and under said land and in holding that as to the one-eighth royalty mentioned in said leases that it continued to be the property of the plaintiffs, and that a one-eighth royalty was a part of the realty in place and continued to be the property of the plaintiffs, the error of the Court being that under the leases made and executed by the plaintiffs and delivered to the various lessees covering the lands and minerals in question the said plaintiffs did sell more than seven-eighths of the minerals, that is the plaintiffs, under the undisputed facts in this case and applicable law, sold all the mineral rights to the various lessees and the one-eighth royalty reserved by the plaintiffs in the manner and way in which it was did not and does not constitute realty and is not and was not assessable and taxable against the plaintiffs herein as realty, and therefore the Court erred in dismissing

the plaintiffs' bill of complaint and erred in holding that said one-eighth interest reserved to the plaintiffs was realty.

X.

The Court in this case erred in holding that the one-eighth royalty or interest, whatever it may be called, that the plaintiffs had or it is claimed by the defendants that the plaintiffs had in and to the minerals in the land covered by the leases introduced in evidence, the Court erred in holding that the same was a part of the realty so long as it was in place, the error of the Court being that the same was not realty and not taxable as realty, and hence the Court erred in dismissing
237 the plaintiffs' bill of complaint herein.

XI.

The defendants in this case, jointly as well as severally, have attempted to assess your plaintiffs for certain oil in or under the plaintiffs' lands in Wichita County, Texas, on January 1st, 1923, the defendants contending that said oil while in place constituted land or realty taxable and assessable against your plaintiffs on January 1st, 1923, as land or realty. The plaintiffs say that on January 1st, 1923, and prior thereto, or at any time subsequent thereto your plaintiffs did not have any title to any oil in, on, or under said lands in this: that long prior to January 1st, 1923, W. T. Waggoner plaintiff herein, had executed oil and gas leases on all of said lands, by which leases, for valuable consideration received by W. T. Waggoner, and of the royalties to be paid to him out of any minerals or oils that might be discovered in or under said lands by the lessees, the said

plaintiffs, and especially the said W. T. Waggoner, had leased, granted, bargained, sold and conveyed to the several lessees in said leases all the oil, gas, and other minerals in and under said tracts of land, with the exclusive right to the said lessees to drill said land and to produce oil and minerals therefrom; and, your plaintiffs say that by reason thereof, and by reason of said leases and each of them being in full force and effect on January 1st, 1923, and prior thereto and subsequent thereto, and not having been forfeited, that therefore under the law, on January 1st, 1923, the one-eighth royalty or interest, whichever it may be called or found to be, that the plaintiffs had to said oil that had not been pumped to the surface, that the said plaintiffs had no title or interest to the same such as to constitute it land or realty, but that the same had passed completely to the lessees, and that the same was not land or realty subject to be taxed as land or realty against plaintiffs, and therefore the Court herein erred in holding that it was taxable as realty against your plaintiffs, and erred in dismissing the bill of complaint herein.

XII.

The Court herein holding that the one-eighth royalty or one-eighth interest whatever it may be called or termed, that the plaintiffs had to any oil that might be produced from said land under the leases in question was realty erred, the error of the Court being that under the undisputed facts in this case the same was not realty but was personal property and constituted personalty, hence was not taxable as real estate or real property; therefore, the Court erred in dismissing plaintiffs' bill of complaint.

238 XIII.

The Court in this case, in holding that the one-eighth royalty or one-eighth interest given the plaintiffs, or lessors in said leases in question, that said one-eighth interest or royalty was the property of the lessor and was real property and real estate as long as it was in place, the Court erred in so holding because of the fact that under the law as applied to the undisputed facts in this case said interest or royalty, whichever it may be called, was not in realty but was personalty, and being personalty was not taxable against plaintiffs in Wichita County under the laws of Texas, the undisputed evidence showing that the said plaintiffs were residents and citizens of Fort Worth, Tarrant County, State of Texas; therefore, the Court erred in dismissing the plaintiffs' bill of complaint.

XIV.

The undisputed evidence in this case showing that on January 1st, 1923, and prior thereto that the plaintiffs, especially the said W. T. Waggoner, executed and delivered leases on the plaintiffs' lands in Wichita County, by which leases all the mineral rights, including oil and gas were conveyed to various lessees, and it appearing that said lessees had not forfeited the same in any manner or way, that is said leases, therefore under said leases introduced in evidence and before the Court, involving the tax in question, the one-eighth royalty or one-eighth interest provided for in said leases to go to the plaintiffs constituted personal property, or personalty, and not real property and could only be assessed as personalty in the manner and way as provided for by

the statutory law of Texas, hence the Court herein erred in holding that the same was not personalty and erred in holding that the same was real property, and hence erred in dismissing the bill of complaint of the plaintiffs herein.

XV.

Because the Court herein erred in holding that the one-eighth royalty, or interest, continued to be and always was the property of the lessor, to-wit, the plaintiffs herein, and that the same was realty as long as it was in place and taxable as real estate, the error of the Court being that the said one-eighth royalty, or interest, was so remote and speculative as not to be assessable as property, hence the Court erred in holding the same assessable, and in this connection if it was never
239 drilled, that is if the lessees did not drill, the same would not be produced, hence as to whether or not the plaintiffs received any oil and as to whether oil would be found was remote and contingent; therefore, the Court erred in holding that said one-eighth interest was taxable at all, hence the Court erred in dismissing the bill of complaint herein of the plaintiffs.

XVI.

The Court herein erred in holding plaintiffs were liable for the tax claimed by the defendants, and especially the defendant Wichita County, the error of the Court being that said defendants claim that the one-eighth royalty, or interest given the plaintiffs, or the said W. T. Waggoner, in said oil leases was realty, hence this being the contention of the defendants, and the Court having found with such contention, the Court erred because the

one-eighth royalty, or interest given the plaintiffs, and especially the said W. T. Waggoner, is such a remote, contingent, and speculative interest as to deprive the same of the character of realty, but does make the same personalty only, and taxable as personalty only under the Texas statutes, hence the Court erred in dismissing the bill of complaint herein.

XVII.

The Court herein erred in finding against the plaintiffs herein and dismissing the plaintiffs' bill of complaint, for the reason that the undisputed evidence shows that on January 1st, 1923, and prior thereto the said plaintiffs, and especially the said W. T. Waggoner, had by proper leases conveyed all his minerals rights, that is had conveyed the minerals in and under the surface of his lands in Wichita County to various lessees, said leases, however, giving the said plaintiffs, and especially the said W. T. Waggoner, a one-eighth royalty or interest in the oil that the said lessees might find in said land. Now, then, this being true, plaintiffs say that this one-eighth interest, or royalty, under the undisputed facts herein was not realty or real estate as contended for by the defendants, and as held by the Court, but that the same, under the Texas statutes on taxation became a credit and was a credit and taxable as personalty only in the manners and ways as provided for by the Texas statutes, and that therefore the Court erred in holding to the contrary and erred in holding that the same was realty, and hence erred in dismissing the plaintiffs' Bill of Complaint, for under the undisputed facts in this case and under and by virtue of the terms of the leases in question the said plaintiffs'

one-eighth interest, or royalty, was a credit within the terms of the Texas statutes on taxation.

240 XVIII.

The Court in this case erred in holding that the one-eighth interest or royalty given the plaintiffs in the leases in question was realty, that is that said oil, as long as it was in place was realty and a part of the realty and taxable against your plaintiffs, the error of the Court being that if it be conceded that minerals in place are ordinarily realty, yet under the Texas statutes, which govern herein on the question of taxation, that under and by virtue of said Texas statutes said one-eighth interest and royalty given the said plaintiffs was nothing more than a credit and taxable as such under and by virtue of the laws of the State of Texas and not taxable as realty, hence the Court erred in holding that the same was taxable as realty and in dismissing the plaintiffs' bill of complaint.

XIX.

Because the Court herein erred in dismissing the plaintiffs' bill of complaint, for the reason that under the undisputed facts in this case the one-eighth royalty, or interest, given the plaintiffs, or the said W. T. Waggoner in said oil leases in question, said one-eighth royalty or interest comes within the term "credits" as defined by the Texas statutes relative to taxation; therefore the evidence showing that the plaintiffs rendered said one-eighth interest, or royalty, as personal property, or credits, for a certain amount, and the evidence showing that the said plaintiffs rendered such credit for an

amount that they believed they could collect only, and the undisputed evidence showing that the amount the plaintiffs rendered said credit for was just and reasonable, and that they did not receive practically any more on said credit than they rendered it for, therefore the Court herein erred in dismissing the bill of complaint for the reason that the facts show that the plaintiffs were not liable for any more taxes than they offered to pay and tendered to pay to the defendants, hence the Court erred in dismissing the plaintiffs' bill of complaint herein.

XX.

Because the Court herein erred in dismissing the plaintiffs' bill of complaint, for the reason that under the undisputed facts the said plaintiffs were not liable to pay a greater sum of taxes than those tendered by them and as they offered to pay, as shown by their bill of complaint, and all of which the undisputed evidence in this case shows; therefore, the Court erred in dismissing the bill of complaint herein.

241 XXI.

The Court herein erred in dismissing the plaintiffs' bill of complaint, for the reason that the undisputed evidence in this case shows that the amount of tax that the defendants have assessed against the plaintiff on said one-eighth royalty, or interest, as realty is greatly in excess and beyond what the same was really and actually worth, that is the assessment againt said property as realty is for an amount and assessed the plaintiffs for an amount and on an amount greatly in excess of what the said plaintiffs actually received in money

from the lessees as their one-eighth interest, or royalty; therefore, this being true the Court herein erred in dismissing the bill of complaint herein.

XXII.

Because the Court herein erred in this case in dismissing the bill of complaint of the plaintiffs herein, the error of the Court being that the defendants have assessed said one-eighth royalty, or interest, given the plaintiffs in said leases as real estate, and which assessment the Court has approved, and in assessing said one-eighth royalty or interest as real estate the same has been assessed at a value in excess of what the plaintiffs actually received from their said one-eighth royalty interest in said leases, hence this being true the Court herein, under the Texas statutes, erred in holding that the same was realty and assessable as realty, and erred in failing to hold that the same was personalty, that is a credit, as defined by the Texas statutes, hence erred in dismissing the bill of complaint herein.

XXIII.

The undisputed facts in this case show that at the time this suit was brought by the plaintiffs that they were right and were entitled to the relief sought and prayed for, and the Court admitting this to be true; therefore, the Court in this case erred in dismissing the plaintiffs' bill of complaint herein.

XXIV.

The undisputed evidence in this case shows that when this said suit was filed that the plaintiffs were entitled

to the relief asked for in their bill of complaint. The evidence shows that after the bill of complaint herein was filed that the defendants prepared a supplemental roll and placed the plaintiffs' property in the real estate column without any notice or knowledge to the plaintiffs, which they were entitled to have; therefore, this being true, the Court erred in dismissing the said plaintiffs' bill of complaint herein, for the reason that under the statutory law of Texas the plaintiffs were entitled, as provided for by the statutory law of Texas, to
242 have their day and hearing before the Commissioners Court on whether or not the said property should be taxed as real property, and as to whether it should be taxed at the value therein fixed, hence the Court herein, by dismissing the bill of complaint in this case, erred, for the reason that he should have sustained said bill of complaint, for the action of the Commission of the defendants in placing said property in the real estate column without giving the plaintiffs a hearing, as provided for by the Texas Statutes, can not be done, that is the action of the Commissioners is void and illegal, hence the Court should have held that the plaintiffs' bill of complaint was well taken and should have found against the defendants.

XXV.

The Court herein erred in dismissing the plaintiffs' bill of complaint herein, for the reason that at the time the bill of complaint in this case was filed the said plaintiffs were entitled to the relief therein prayed for. This being true, and the undisputed evidence showing that after the institution of this suit by plaintiffs that the said defendants herein, especially Wichita County, filed

a supplemental roll putting the plaintiffs' property on said roll as real estate, and this all having been done without the knowledge or consent of the plaintiffs, as appears from the undisputed evidence; therefore, said assessment, and plaintiffs not having had their day before the Commissioners Court to be heard on whether or not the same should be assessed as personalty or realty after the institution of this suit, and not having had their day to be heard on the question of the amount that said realty was to be assessed; therefore, this being true the action of defendants taken after the institution of this suit was void, illegal and not binding, hence the Court in this case erred in dismissing the plaintiffs' bill of complaint.

XXVI.

The undisputed evidence in this case showing that when this suit was instituted that the plaintiffs were entitled to the relief prayed for in their bill of complaint, therefore, this being true the action of the defendants, taken after the institution of this suit relative to the preparing of the supplemental roll and everything in connection therewith, could not change and did not change the facts, and could not and did not deny the plaintiffs the relief that they were entitled to when the bill of complaint herein was filed; therefore, the Court herein erred in dismissing the plaintiffs' bill of complaint.

243 XXVII.

The Court herein erred in dismissing the plaintiffs' bill of complaint, for the reason that the undisputed evidence shows that the plaintiffs tendered the amount

that they should as taxes on the land, and that the lands were separately assessed and put on the roll, and the undisputed evidence shows that there was a refusal to accept the money or issue receipts therefor, and this being true, and plaintiffs having tendered the taxes on the property separately assessed and rendered, and defendants having failed to receive the same and issue receipts therefor, therefore the Court erred in dismissing the plaintiffs' bill of complaint herein.

XXVIII.

The Court herein erred in holding that the said one-eighth interest, or royalty, that the plaintiffs were given in said leases constituted minerals in place, hence was assessable as a part of the realty or land of the plaintiffs, the error being that under the undisputed facts in this case and under the provisions of the leases in question the said one-eighth interest or royalty given the plaintiffs was not mineral in place, hence was not and could not be a part of the realty belonging to said plaintiffs herein, and this being true the Court erred in dismissing the bill of complaint herein.

XXIX.

The Court herein erred in holding that the one-eighth interest, or royalty, in question was not personal property, and as personal property taxable in Fort Worth, Texas, the domicile and residence of the plaintiffs.

XXX.

The undisputed evidence in this case showing that it was uncertain and is uncertain, and was as far as the

plaintiffs were concerned at the time in question, as to how much oil they might get out of their one-eighth interest or royalty, which was given to them and provided for by the leases in evidence and before the Court, and the plaintiffs, when they rendered the same, having provided an estimate that they would get so many barrels per day, and this having been done in good faith, and the evidence showing that this was done in good faith; therefore, this being true, and the same being personalty and not real property, as defined by the Texas statutes, therefore the Court erred in permitting the defendants to raise said assessment and to hold it was realty, and erred in dismissing the bill of complaint herein, for plaintiffs say that under the Texas law they were
244 not required to list or render a greater portion of their credits or personal property than they believed would be received or collected, and the evidence shows that the plaintiffs did this, and did it in good faith, hence this being true, and the one-eighth royalty interest being personal property, or credits, within the terms of the Texas statute, the Court therefore erred in dismissing the plaintiffs' bill of complaint.

XXXI.

The Court erred in admitting in evidence, over the objection of plaintiffs, the supplemental tax roll prepared and made up by the Tax Assessor of Wichita County, under the direction of the Commissioners Court of said county, which supplemental tax roll was so made up subsequent to the institution of suit herein, and in order to show on said supplemental roll the assessment of the oil interests of the plaintiffs in Wichita County, Texas, as real property, instead of as personal property, as said

oil rights were shown in the original rolls for the year 1923 of said county, which evidence was objected to because irrelevant, immaterial and incompetent for any purpose, and for divers other reasons fully set forth and shown by the statement of evidence herein and the proceedings had and taken when said supplemental roll was introduced in evidence, all of which is fully set forth and shown in the statement of the evidence on file herein.

Wherefore, come now the plaintiffs and each of them and present these their assignments of error, and ask that they be filed and considered as their assignments of error, and plaintiffs pray that said decree be reversed, and that said Court may be directed to enter a decree in accordance with the prayer of their said bill, and that plaintiffs be given the relief prayed for, and which they may show themselves entitled to under the facts herein and in equity.

JOE B. CARRIGAN,
THOMPSON, BARWISE & WHARTON,
Solicitors for plaintiffs.

---

245 APPLICATION FOR APPEAL AND ORDER GRANTING SAME.

Filed and entered June 3, 1924.

The petition of the plaintiffs herein respectfully represents to the Court:

That petitioners are aggrieved by the judgment and decree herein rendered on the 11th day of April, 1924,

in favor of defendants and against the plaintiff, dismissing the bill of complaint of plaintiffs, and your petitioners, for the reasons specified in the assignments of error filed herewith, desire to appeal from said decree and desire that said appeal, returnable to the Circuit Court of Appeals for the Fifth Circuit, shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said decree dismissing said bill.

Wherefore, petitioners pray the Court that the said appeal may be allowed and that upon petitioners giving bond in an amount to be fixed by this Court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said order and judgment dismissing this cause; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit according to law, and that a transcript of the record, proceedings, papers and exhibits upon which said decree was rendered, duly authenticated, be sent to the said Circuit Court of Appeals, and petitioner prays for all general and equitable relief.

JOE B. CARRIGAN,
THOMPSON, BARWISE &
WHARTON,
Solicitors for Plaintiffs.

Wichita Falls, Texas, June 3, 1924.

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to W. T. Waggoner Estate, et al., petitioners herein and plaintiffs in this suit, from the decree of April 11, 1924, entered against them in the above entitled and numbered cause, and that said appeal shall be returnable to the United

States Circuit Court of Appeals for the Fifth Circuit and petitioners are further ordered to give bond on said appeal for the sum of $2,000.00, as an appeal bond, which shall operate as a supersedeas, and it is further ordered that a transcript of the record in this cause be filed in the United States Circuit Court of Appeals according to law, as prayed for.

246

WM. H. ATWELL, Judge.

---

248 In the District Court of the United States for the Northern District of Texas, Wichita Falls Division thereof.

W. T. Waggoner Estate, et al., Plaintiffs,

vs. No. ...., In Equity.

Wichita County, et al., Defendants.

Know all men by these presents:

That we, W. T. Waggoner Estate and W. T. Waggoner, as principals, and T. B. Yarbrough and F. W. Power, as sureties, jointly and severally, are held and firmly bound unto Wichita County, Texas, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz and F R. Knauth and Guy C. Raley in the full and just sum of Two Thousand Dollars to be paid to the said Wichita County, Texas, and D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley, and their attorneys, executors, administrators and assigns for the payment well and truly to be made, we jointly as well

as severally bind ourselves, our heirs, executors and administrators, jointly as well as severally, by these presents.

Sealed with our seals and dated this 6th day of June, A. D. 1924.

Whereas, lately at a term of the District Court of the United States for the Northern District of Texas, Wichita Falls Division thereof, in a suit pending in said Court between W. T. Waggoner Estate and W. T. Waggoner, as plaintiffs, and Wichita County, Texas, and D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley, as defendants, a decree was rendered against the said W. T. Waggoner Estate and the said W. T. Waggoner, and the said W. T. Waggoner Estate and the said W. T. Waggoner having obtained an appeal and filed a copy thereof in the clerk's office of said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Wichita County, Texas, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden in the City of New Orleans of said Circuit on the 3rd day of July, next.

Now the condition of the above obligation is such that if the said W. T. Waggoner Estate and W. T. Waggoner shall prosecute their appeal with effect and answer all damages and costs if they fail to make their appeal good, then the above obligation is to be void, else to remain in full force and effect.

249

Executed at Fort Worth, Texas, this the 6th day of May, A. D. 1924.

W. T. WAGGONER ESTATE,
W. T. WAGGONER,
By J. H. BARWISE, JR.,
Their Attorney.
T. B. YARBROUGH,
F. W. POWER,
Sureties.

Approved this 10 day of June, A. D. 1924.
WM. H. ATWELL,
United States District Judge.

Approved this 18 day of June, A. D. 1924.
LOUIS C. MAYNARD,
United States District Clerk,
By J. A. LANTZ, Deputy.

Supersedeas Bond on Appeal. Filed 18 day of June, 1924.

---

250 PRAECIPE FOR TRANSCRIPT ON APPEAL.

Filed June 18, 1924.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Plaintiffs' original bill.

2. Amended bill.

3. Defendants' motion to dismiss bill.

4. Original answer of defendants.

5. Amended answer of defendants.

6. Order of the Court overruling defendants' motion to dismiss.

7. Judgment of the Court or final decree.

8. Narrative statement of evidence under Equity Rule 75, and order approving same.

9. Petition for appeal, filed April 11, 1924.

10. Order allowing petition for appeal dated April 11, 1924.

11. Petition for extension of time.

12. Order granting extension of time.

13. Assignments of error.

14. Petition for appeal.

15. Order allowing petition for appeal. (This was sent to Mr. Lantz on June 5, 1924).

16. Citation of error and waiver of service.

17. Appeal bond.

18.

19.

20.

21.

22. Final certificate.

23. Praecipe for transcript of record.

251 Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully,

JOE B. CARRIGAN.
THOMPSON, BARWISE & WHARTON,

.....
Solicitors for Appellants.

We hereby agree that the above and foregoing praecipe and the records, documents, papers and proceedings therein set forth are sufficient for a complete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this

cause to complete said transcript, and we hereby waive the issuance and service of notice upon any party hereto and agree that said praecipe shall be obeyed and acted upon by the Clerk as fully and to all intents and purposes and in the same manner as if said proceedings had been regularly filed and a true copy thereof served upon each party hereto.

BULLINGTON, BOONE and
HUMPHREY,
E. T. DUFF and JOHN B. KING,
Solicitors for Appellees.

252 CLERK'S CERTIFICATE.

I. LOUIS C. MAYNARD, Clerk of the District Court of the United States for the Northern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a true and correct copy and transcript of the record, assignments of error, and of all proceedings in cause No. 152 in Equity, on the docket of said Court at Wichita Falls, Texas, wherein W. T. Waggoner and W. T. Waggoner Estate are plaintiffs, and Wichita County, Texas, et al., defendants, as fully as the same now remain on file and of record in my office at Wichita Falls, Texas.

Witness my hand officially and the seal of said Court at Wichita Falls, Texas, this 27th day of June, 1924.

LOUIS C. MAYNARD, Clerk,
By J. A. LANTZ,
(Seal) Deputy.

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * *

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—November 10, 1924

On this day this cause was called, and, after argument by J. H. Barwise, Jr., Esq., for appellants, and E. W. Napier, Esq., and T. R. Boone, Esq., for appellees, was submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4379

W. T. WAGGONER ESTATE et al., Appellants,

versus

WICHITA COUNTY et al., Appellees

Appeal from the District Court of the United States for the Northern District of Texas

Geo. Thompson, J. H. Barwise, Jr., and G. W. Wharton (Thompson, Barwise & Wharton, F. B. Walker and Joe B. Carrigan on the brief), for Appellants.

T. R. Boone and E. W. Napier (T. R. Boone, E. W. Napier, E. L. Fulton, E. T. Duff and John B. King on the brief), for Appellees.

Before Walker and Bryan, Circuit Judges, and Dawkins, District Judge

OPINION—Filed January, 28, 1925

WALKER, Circuit Judge:

This is an appeal from a decree dismissing a bill in equity filed by the appellants, W. T. Waggoner, a citizen and resident of Tarrant County, Texas, (herein referred to as the lessor), and W. T. Waggoner Estate, a trust or voluntary association created by written articles of agreement, to enjoin the enforcement or collection of a tax levied by the taxing authorities of Wichita County, Texas, for the year 1923, on so-called royalties under oil and gas leases, made by the lessor, of sundry tracts of land in that county, which lands were owned by the lessor on January 1, 1923, the date for the fixing of the 1923 taxes, and were, in March, 1923, conveyed, together with the lessor's interest in oil produced therefrom, to the other appellant.

Within the time prescribed by statute the lessor, for taxation purposes for the year 1923, rendered or returned to the tax assessor of Wichita County, on a form furnished by that official, an inventory of property. Following a descriptive list of parcels of land, a value of each parcel being stated, that instrument contained the following:

"Total number of producing wells..... 143
Royalty, 723..... $325,350"

In making up the rolls in the assessor's office the just mentioned item was put on the roll under the heading "Personal Property." After the lessor was given notice to appear before the Equalization Board to show cause why his valuation of that item should not be raised to $1,000 per barrel, and after he had by his agent appeared before the Board and contested the valuation, the Board raised the valuation of that item to $723,000. After this suit was brought the Tax Assessor, in compliance with an order of the Commissioners' Court, prepared a supplemental or amended roll, putting that item on the real estate roll. By the terms of one of the oil and gas leases which are in question, the lessor, for the recited consideration of a stated sum of money, "to be paid in oil produced from" a described tract of land, "granted, demised, leased, and let" to a named corporation that tract of land "for the sole and only purpose of drilling and mining for gas and oil." That instrument contained the following:

"Leasee agrees and binds himself to pay an annual rental of One Dollar and Fifty Cents per acre until actual drilling is begun hereon, and failure to pay said rental when due at the option of the lessor shall void this lease.

Subject to the terms and condition herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided however no one well shall hold more than ten acres, in a square form, said well being the center thereof.

In consideration of the premises, the lessee convenants and agrees:

To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced and (saved from) said premises, settlement to be made not later than the tenth day of each month for the preceding month.

That the lessee will pay 7/8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

That the lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price."

Other forms of leases in question do not differ in any material respect from the one just mentioned and quoted from.

A principal contention in behalf of the appellants is that the property interest which is the subject of the tax in question is personal property, and is not taxable in a county other than that of

the owner's residence. The maintenance of this contention involves giving to the leases in question the effect of sales and conveyances by the lessor of the oil contained in the land therein described. Minerals in place may be severed from the remainder of the land by appropriate conveyances. Humphreys-Mexiz. Co. v. Gammon, 254 S. W. 296. As to one-eighth of the oil in or under the land described the leases contain no words of transfer or conveyance or any language indicating that in any contingency the lessor was to cease to be the owner thereof or that the lessee was to have, or be entitled to acquire, any right or title thereto. Each of those instruments had the effect of providing for a working arrangement for drilling and mining for gas and oil in or under described land, the lessee incurring the obligation "to deliver to the lessor, free of charge, in the pipe line to which said lease was to be connected, the equal one-eighth (1/8) part of all the oil and gas produced and saved from said premises." No provision was made for the lessee becoming the owner of the part of the oil produced which was required to be delivered to the lessor. In this respect the instruments in question are materially different from the one which was under consideration in the case of Stephens County v. Mid-Kansas Oil & Gas Co., 254 S. W. 290. By the terms of the instrument which was in question in that case the lessee was required to pay to the lessor ten per cent of the market price of gas produced, and, as to oil produced, the lessee was given the option of delivering one-eighth thereof to the lessor or paying to him the market price in cash thereof. It was held that that instrument gave the lessee therein dominion over the oil and gas in the land described. As above indicated, the leases in question in the instant case do not evidence a purpose to give to the lessees therein ownership, dominion of, or the right to dispose of, the part of the oil produced which was required to be delivered to the lessor, and those instruments contain no provision under which the lessees could acquire or become entitled to that part of the oil produced. From the facts that prior to the making of the leases now in question the lessor was the owner of the oil in or under the land described, and that nothing contained in those instruments evidences the lessor's consent that the lessee have or retain as owner the part of the oil produced which the lessee was required to deliver to the lessor, it follows that the lessor was the owner of that part of the oil both before and after it was brought to the surface. His property right to mineral oil in or under land owned by him was taxable as real property. Vernon's Sayles' Texas Civil Statutes 1914 Annotated, Art. 7504.

A Texas statute (Vernon's Sayles' Texas Civil Statutes 1914, Art. 7702) provides for real property omitted from the real property tax roll in any year being listed thereon at any meeting of the Commissioners' Court. The property interest in question being identified by an entry in the list of property returned for taxation by the lessor, he and his assign could not have been prejudiced by the action of the Commissioners' Court in transferring that item of property

assessed for taxation from the personal property roll to the real property roll, especially as the lessor had and availed himself of an opportunity to be heard on the question of the valuation to be placed on that item of property.

The tax on the lessor's interest in the oil in or under the land was attacked on the ground that the valuation thereof was arbitrary and that there was unjustifiable discrimination in the valuations placed on the respective interests in the oil of the lessor and the lessees. It was disclosed that the taxing authorities fixed the daily production of producing oil wells on the basis of their average daily production in barrels during a period of several months, that, after investigation and consideration of evidence on the subject, the value of a lessor's interest was fixed at $1,000 multiplied by the number of barrels received daily by the lessor, and the value of a lessee's interest was fixed at $450 multiplied by the number of barrels produced daily to which the lessee was entitled. From the fact, disclosed by evidence adduced, that the total production in the year 1923 from wells on lands described in the leases in question was around one thousand barrels a day it may be inferred that the taxing authorities did not act arbitrarily or unjustly towards the lessor in fixing the daily production from his leased lands at 723 barrels. There was a substantial basis for the difference between the way adopted for arriving at the value of the lessor's interest in oil produced and that adopted for arriving at the value of the lessee's interest, in that the lessee bore the loss of drilling "dry holes" and all of the expenses of finding oil and bringing it to the surface, while the lessor was at no expense with reference to the part of the oil which was required to be delivered to him. It was not made to appear that the methods adopted by the taxing authorities were lacking in uniformity or fairness to all persons similarly situated.

The conclusion is that on no ground suggested were the appellants entitled to the relief sought. The decree is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—January 28, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, W. T. Waggoner Estate, and others, and the sureties on their appeal bond herein, T. B. Yarbrough and F. W. Power, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL—Filed February 26, 1925

Appellants, W. T. Waggoner Estate and W. T. Waggoner, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a judgment has therein been rendered on the 28th day of January, A. D. 1925, affirming the decree of the District Court of the United States for the Northern District of Texas, Wichita Falls Division, and that the matter in controversy in said suit exceeds $1,000.00 besides cost; that this cause is one in which the United States Circuit Court of Appeals for the Fifth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellants pray that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause, with all those concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States; and prays for a supersedeas of said judgment and such other processes as is required to effect the appeal prayed for.

(Signed) J. H. Barwise, Jr. Thompson, Barwise & Wharton, Attorneys for Appellants.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 26, 1925

It is hereby ordered that the supersedeas and appeal in the above entitled case to the Supreme Court of the United States be and are hereby allowed, and bond fixed in the sum of Five Thousand ($5,000.00) Dollars; conditioned as the law directs.

February 26th, 1925.

(Signed) R. W. Walker, U. S. Circuit Judge, Fifth Circuit.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION RE AMOUNT IN CONTROVERSY—Filed February 26, 1925

Appellants, W. T. Waggoner and W. T. Waggoner Estate, by and through their attorneys, and appellees, Wichita County, Texas, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth and Guy C. Raley, by and through their attorneys, who are familiar with the matters in controversy in this suit, agree and hereby stipulate that the matters so in controversy in this suit, and the amount so in controversy exceeds the sum of $1,000.00, exclusive of interest and costs.

W. T. Waggoner Estate, W. T. Waggoner, by (Signed) Thompson, Barwise & Wharton, Their Attorneys. Wichita County, Texas, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth, and Guy C. Raley, by (Signed) T. R. Boone, Their Attorney.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 26, 1925

The appellants in the above entitled cause, in connection with their petition for appeal herein respectfully present and file therewith their Assignments of Error, as to which matters and things they say that the decree entered herein on the 28th day of January A. D. 1925 is erroneous, to-wit:

I

The decree entered in this cause by the Circuit Court of Appeals, Fifth Circuit, affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding and deciding that oil royalty interest is real property, for that the undisputed evidence discloses that on the first day of January, 1923, the taxable year involved, that appellants had by proper leases conveyed all mineral rights in and under the surface of lands in Wichita County to various lessees, retaining a one-eighth royalty, which under the Texas statutes relating to taxation, and under the decision of the highest tribunals of the State of Texas, was a credit taxable as personalty, not in Wichita County but in the County of appellants' domicile.

II

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding that no error was committed by the action of the Commissioners' Court of Wichita County in transferring property from the personal property roll to the real property roll, for that the supplemental roll effecting such transfer from the personal property to the real property roll, was done without the knowledge, consent of acquiescence of appellants and without appellants having had their day before said Commissioners' Court of Wichita County to be heard on whether such property could be assessed as personalty or realty or as to the value as to which such property should be assessed, which deprived rights under the statutes of Texas relating to such matters being given.

III

The decree entered in this case by the Circuit Court of Appeals Fifth Circuit, affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding that the one-eighth interest royalty given to appellants in the leases in question was realty and taxable as such against appellants, for under the Texas statutes relating to such, and under the authority of the highest tribunals of the State of Texas, such royalty interest constitutes personalty, being nothing more than a credit and is so taxable under the laws of the State of Texas, not in Wichita County but at the domicile of appellants.

IV

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in decreeing that appellants' Bill of Complaint should have been dismissed, for the reason that under the undisputed facts, appellants tendered and offered to pay to the proper authorities all taxes legally due by them in Wichita County, as revealed by their Bill of Complaint, and as revealed by the undisputed evidence, and the Circuit Court of Appeals, Fifth Circuit, erred in affirming the dismissal of their Bill of Complaint.

V

The decree entered in this cause by the Circuit Court of Appeals, Fifth Circuit, affirming the decree of the District Court in and for the Northern District of Texas, is erroneous in that under the undisputed evidence in this case the appellees in making assessments of taxes unlawfully discriminated against appellants, for that in arriving at the value of the taxable property of appellants, oil was figured at $1,000 per barrel of daily production for taxation purposes, and the undisputed evidence showed that the oil of other tax-

payers was assessed at the price of $450 per barrel of daily production.

VI

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in decreeing that said bill should be dismissed, for under the undisputed facts appellants were entitled to the relief prayed for in their Bill of Complaint, because the tax rendition of Wichita County against appellants for the year 1923, represented an unlawful discrimination against appellants in that for such year all the personal property of appellants was assessed for taxes in Wichita County at an amount equal at least to 50% of its true value, whereas, the taxing authorities for such County for said year systematically freed and exempted personal property in said County of other taxpayers.

VII

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit, affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding that appellants' Bill of Complaint was properly dismissed, for that under the undisputed facts appellants were not liable for the tax sought to be enjoined.

VIII

The decree entered in this cause in the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in affirming that the trial court did not err in admitting in evidence over appellants' objection the supplemental tax roll prepared and made up by the Tax Assessor of Wichita County under the direction of the Commissioners' Court of said County, which said roll was made up subsequent to the institution of suit herein, and in order to show on said supplemental roll the assessment of oil interests of appellants as real property instead of personal property.

IX

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding that appellants' royalty interest was not personal property and holding that the same was taxable in Wichita County, a County other than the domicile of appellants.

X

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous, for the reason that under

the undisputed evidence and facts in this case the appellants jointly, as well as severally, were entitled to have a decree entered in their favor, and the court therefore erred in holding against appellants herein, and each of them, and in rendering a decree against the appellants herein.

XI

The decree entered in this cause by the Circuit Court of Appeals Fifth Circuit affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding that under the particular leases involved in this cause, no provision was made for the lessee becoming the owner of the part of the oil produced which was required to be delivered to the lessor, and such leases did not give to the lessees ownership, for such holding concerns property rights in the State of Texas and conflicts with the holdings of the highest tribunals of the State of Texas, and erroneous.

XII

The decisions of the highest tribunals of the State Courts are controlling as to property rights of that State, and the decisions of the State of Texas holding that a lessee acquires complete ownership of all minerals and mineral rights upon the execution to him of an oil and gas lease, the Circuit Court of Appeals Fifth Circuit is in error in holding that ownership under the leases in question in this case did not pass, so far as all the mineral rights are concerned, to the lessees, and erred in affirming the decree dismissing appellants' Bill of Complaint.

XIII

The undisputed evidence in this case discloses that the valuation placed upon properties of appellants was discriminatory as to property of like kind, in that the undisputed evidence discloses that for taxation purposes the oil rights of appellants were valued at $1,000 per barrel of daily production, whereas, other property owners of such like property were systematically assessed on a basis of $450 per barrel, and hence the Circuit Court of Appeals, Fifth Circuit was in error in affirming the decree of dismissal of appellants' bill.

XIV

The undisputed facts in this case disclosing that appellants and each of them, jointly as well as severally, were entitled to the relief prayed for in their Bill of Complaint on which they went to trial, the Circuit Court of Appeals is in error under such undisputed facts in affirming the decree dismissing the Bill of Complaint of these appellants.

Wherefore, appellants pray that said judgment and decree of said Circuit Court of Appeals may be reversed.

(Signed) J. H. Barwise, Jr., Thompson, Barwise & Wharton,
Attorneys for Appellants.

BOND ON APPEAL FOR $5,000—Approved and filed March 9, 1925; omitted in printing

---

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 12, 1925

We hereby agree that the record in the above cause on appeal to the Supreme Court of the United States shall consist of the record in the Circuit Court of Appeals, Fifth Circuit, and the following documents:

1. Petition for appeal.
2. Order allowing appeal.
3. Assignments of Error.
4. Agreement as to amount in controversy.
5. Bond.
6. Waiver of citation.
7. Agreement as to record.
8. Opinion U. S. Circuit Court of Appeals, Fifth Circuit.

(Signed) Thompson, Barwise & Wharton, Attorneys for Appellants. T. R. Boone, Attorneys for Appellees.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

WAIVER OF ISSUANCE AND SERVICE OF CITATION—Filed March 12, 1925

Notice of the allowance of an appeal from the United States Circuit Court of Appeals for the Fifth Circuit to the Supreme Court of the United States, is hereby acknowledged, and issuance and service of citation with reference to said appeal is hereby waived for and on behalf of Wichita County, D. B. Sartin, H. H. Haynes, J. B. Jackson, L. L. Kuntz, F. R. Knauth, and Guy C. Raley.

(Signed) T. R. Boone, Attorney for Appellees.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages num-

bered from 234 to 256 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4379, wherein W. T. Waggoner Estate, et al., are appellants, and Wichita County, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 233 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of March, A. D. 1925.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of the United States Circuit Court of Appeals, Fifth Circuit.)

Endorsed on cover: File No. 30,983. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 332. W. T. Waggoner Estate and W. T. Waggoner, appellants, vs. Wichita County and D. B. Sartin, H. H. Haynes, et al. Filed March 27th, 1925. File No. 30,983.

Office Supreme Court, U. S.
FILED
MAR 9 1928
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

No. [redacted] 52

—o—

W. T. WAGGONER ESTATE AND W. T. WAGGONER,
Appellants,

vs.

WICHITA COUNTY AND D. B. SARTIN, H. H. HAYNES, ET AL., *Appellees.*

—o—

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

—o—

BRIEF OF APPELLANTS

—o—

J. H. BARWISE, JR.,
THOMPSON, BARWISE & WHARTON,
Attorneys for Appellants,
Fort Worth, Texas.

FORT WORTH BRIEF PRINTING CO., 1010 THROCKMORTON ST. LAMAR 4010

INDEX

	Page
Citation of Opinions to be Reviewed	1
Grounds of Jurisdiction	1
Authorities on Jurisdiction	3
Discussion of Jurisdiction	4
Statement of the Case	6
Statement of Facts	12
Statement of Questions Involved	16
Specification of Error	17
Summary of Argument	18
Argument	19
Conclusion	52
Assignments of Error	53

AUTHORITIES

	Page
Burgess et al v. McCommas, 129 S. W. 382	32
Clarke v. Clarke, 178 U. S. 186	21
Curlee v. Anderson et al, 235 S. W. 622	39
Cooley on Taxation, Vol. II, Ed. IV, Sec. 455	49
Davis, Director General, v. Wallace, 257 U. S. 478	4
Ferris v. Kemble, 75 Tex. 476; 12 S. W. 689	49
Greene v. L. & I. R. R., 213 U. S. 175	4, 5
Guffey v. Jas. A. Smith, 237 U. S. 101	21
Grogan v. City of Brownwood, 214 S. W. 532	31
Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296	23
Hogg v. Magnolia Pet. Co., 267 S. W. 482	38
Jones v. O'Brien, 251 S. W. 208	37
Judicial Code, Sect. 24	3
Judicial Code, Sect. 128	3
Judicial Code, Sect. 238	4
Judicial Code, Sect. 238-A	4
Judicial Code, Sect. 241	4

AUTHORITIES—Continued

	Page
Kuhn v. Fairmount Coal Co., 215 U. S. 360	21
Kynerd v. Hulen, 5 F. (2nd) 160	31
Liberto et al v. Sanders et al, 248 S. W. 120	44
McMillian Co. v. Abernathy, 263 U. S. 438	4, 6
Moore v. City of Waco, 85 Texas 211	32
Munsey v. Marnet Oil & Gas Co., 113 Tex. 212	44
Ohio Tax Cases, 232 U. S. 576	5
Robinson v. Jacobs, 113 Texas 231	44
Stephens Co. v. Mid-Kansas, 113 Tex. 160; 254 S. W. 290	22, 34, 44
State v. Rand, 40 N. W. 835	50
Texas Co. v. Daugherty, 107 T. 226; 176 S. W. 717	25, 26
Thomason v. Ham, 113 Texas 239	44
Tex. Co. v. Davis, 113 Texas 321	44
Vernon Sayles' Revised Statutes of Texas 1914, Article 7504	25
Vernon Sayles' Revised Statutes of Texas 1911, Article 7505	47
Vernon Sayles' Revised Statutes of Texas 1914, Article 7506	48
Vernon Sayles' Revised Statutes of Texas 1914, Article 1106	29
Vernon Sayles' Statutes of Texas, Article 1105	28
Wagner v. Lyndon, 262 U. S. 226	4, 5

SUPREME COURT OF THE UNITED STATES

No. 332

—o—

W. T. WAGGONER ESTATE AND W. T. WAGGONER,
Appellants,

vs.

WICHITA COUNTY AND D. B. SARTIN, H. H. HAYNES, ET AL., *Appellees.*

—o—

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

—o—

BRIEF OF APPELLANTS

—o—

This cause comes to this court from the Circuit Court of Appeals for the Fifth Circuit, its opinion being reported in 3 F. (2d) 862 (R. 234). The opinion of the District Court for the Northern District of Texas is reported in 298 Fed. 882.

GROUNDS OF JURISDICTION

Final judgment was rendered in the United States District Court of Texas April 11th, 1924 (R. 77). Appeal allowed to the Circuit Court of Appeals for the Fifth Circuit on April 11th, 1924 (R. 204). The Circuit Court of Appeals rendered its opinion January 28th, 1925 (R. 234) and appeal was allowed

February 26th, 1925 (R. 238), and record filed herein March 27th, 1925.

Appellants filed this suit in the United States District Court for the Northern District of Texas on the Equity Docket against Wichita County and the proper officials thereof attacking the validity of a large part of the taxes the county claimed were owed to it by the appellants for the year 1923.

This suit was filed by appellants asking for the protection afforded to them as citizens of the United States by the Constitution and the Amendments thereto by reason of which jurisdiction of the cause is in the United States District Court.

Specifically and as applied to the facts of this case, after alleging that the amount in controversy exclusive of interest and costs exceeded the sum of $10,000.00 appellants advanced the following contentions:

(a) That appellees assessed against these appellants personal property in the amount of $718,300.00 in Wichita County in excess of such property so owned by appellants and subject to taxation in such county; that such conduct on the part of said appellees resulted and would result in taking their property without due process of law (R. 7 and 8).

(b) That appellees in violation of the Federal Constitution and its Amendments guaranteeing the equal protection of the laws to the citizenship of the United States knowingly, intentionally, arbitrarily and systematically omitted from taxation and left free of taxation personal property of other persons in Wichita

County in value more than $500,000.00, while appellants were assessed on property of the same character in excess of the value thereof (R. 11 and 12).

(c) That appellees in violation of the Federal Constitution and its Amendments unlawfully discriminated against appellants in knowingly, intentionally and arbitrarily assessing property of these appellants at $1,000.00 per barrel for oil, while at the same time they assessed property of lessees in oil leases at $450.00 per barrel (R. 28).

(d) That appellees in violation of the rights afforded by the Federal Constitution and its Amendments assessed the personal properties of appellants in Wichita County at $723,000.00, when under the law as shown by the undisputed facts it did not own personal property subject to taxation in Wichita County in excess of the value of $10,000.00; that as to $718,000.00 said assessment was arbitrary and fraudulent in law, with the consequent result that it deprived the appellants of the equal protection of the laws as afforded by the Constitution of the United States (R. 12).

The lower courts sustained jurisdiction but denied appellants the relief sought upon the merits (R. 77).

AUTHORITIES

Judicial Code, Section 24; United States Compiled Statutes 1916, Section 991.

Judicial Code, Section 128; United States Compiled Statutes 1916, Section 1120.

Judicial Code, Section 238; United States Compiled Statutes 1916, Section 1915.

Judicial Code, Section 238a, added September 14th, 1922; 42 Stat. 837.

Judicial Code, Section 241; United States Compiled Statutes 1916, Section 1218.

Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499.

Davis, Director General, v. Wallace, 257 U. S. 478.

McMillian Company v. Abernathy, 263 U. S. 438.

Wagner Company v. Lyndon, 262 U. S. 226.

DISCUSSION OF JURISDICTION

The Bill filed by the appellants in this case without doubt presents meritorious and substantial questions arising under the Fourteenth Amendment to the Constitution of the United States, as held by the learned Judge of the District Court in passing upon the attack made by the appellees on the question of jurisdiction (298 Fed. 882). Supporting the position of appellants and of the District Court is the opinion of this court in the recent case of *Davis, Director General, et al, v. Wallace*, 257 U. S. 478, in which it was held:

> "The case made by the Bill involved a real and substantial question under the Constitution of the United States. The amount in controversy exceeded $3,000.00 exclusive of interest and costs, so the case plainly was cognizant in the District Court. In such a case the jurisdiction

> of that court, and ours, in reviewing its action, extends to the very question involved, whether of Federal or State law, and enables the court to rest its judgment or decree on the decision of such of the questions as, in its opinion, effectively dispose of the case."

To the same effect, *Greene v. Louisville and Interurban R. R. Co.*, 213 U. S. 175; *Ohio Tax Cases*, 232 U. S. 576.

This case involving as it does the construction or application of the Constitution of the United States should possibly have been appealed from the United States District Court to this court, but section 238a of the Judicial Code as applied by this court in the recent cases of *Wagner Company v. Lyndon*, [illegible] U. S. 226, and *McMillian Company v. Abernathy*, 263 U. S. 438 (appeal to the Circuit Court of Appeals having been allowed within three months and appeal having been allowed from the Circuit Court of Appeals to this court) will operate to effectively lodge this appeal in this court for its decision. This court in the case of *Wagner v. Lyndon*, 262 U. S. 226, speaking through its Chief Justice, said:

> "The case is here on an appeal allowed by a judgment of the Circuit Court of Appeals. The case has been submitted to us on a motion to dismiss or affirm, which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consump-

> tion of time and labor is not in the spirit of the Act of September 14th, 1922. Having the case here and having heard it on the merits, we think we may properly consider that done which ought to have been done, to try the case as hereby appealed from the District Court and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us."

Again in the case of *McMillian Company v. Abernathy*, 263 U. S. 438:

> "We think the Act of 1922 applies to any case in which an appeal to the Circuit Court of Appeals is taken after the period for appeals to this court has expired. Otherwise, the Act will enable one who negligently allowed his right of appeal to this court to go by, to take his appeal to the Circuit Court of Appeals and by transfer get into this court and thus lengthen the time for appeals of this court from three to six months. This result we can not assume Congress intended."

Appeal was allowed in this case to the Circuit Court of Appeals from the District Court within three months (R. 204), and by virtue of the above authorities we believe the case is now properly before this court for determination on the merits.

STATEMENT OF THE CASE

This suit was filed on February 1st, 1924, in the District Court by the W. T. Waggoner Estate and W. T. Waggoner individually against Wichita County and the proper officers thereof (R. 2). W. T. Wag-

goner individually joined as plaintiff because he owned the property involved on January 1st, 1923, which date under the Texas Statute is the one used in determining the property status of the taxpayer for that year.

Appellants alleged that the requisite amount to give jurisdiction was involved and that the suit was instituted for the protection of the rights guaranteed to them as citizens of the United States and of the State of Texas by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 3).

Appellants further alleged that on January 1st, 1923, W. T. Waggoner owned in Wichita County divers and sundry tracts of land on which there were oil wells producing in such quantities that one-eighth thereof was equal to 723 barrels on that date, and that he owned personal property on said date consisting of cattle, horses, wagons, automobiles and farm implements of the value of $4,600.00 as well as 3,000 barrels of crude oil of the value of $1.80 per barrel, and that neither of the appellants owned any other property in Wichita County other than that named (R. 5). That W. T. Waggoner by proper instrument of conveyance conveyed the entire property so owned by him in Wichita County on January 1st, 1923, with the exception of the 3,000 barrels of crude oil, to the W. T. Waggoner Estate, such conveyance dated March 31st, 1923 (R. 5).

Appellants further alleged that within the time prescribed by the Statutes of Texas R. L. More, their agent, rendered all property owned by appellants to

the Tax Assessor of Wichita County, and as required fixed the value of such property; that the tax rolls of Wichita County were in due time made up and presented to the Commissioners' Court of Wichita County sitting as a board of equalization, and that said board, after notice to appellants and over their protest, and in the face of proof showing the incorrectness thereof, raised the assessment on the personal property of appellants to $728,300.00, which action was wholly arbitrary, erroneous in fact and in law, and the amount at which the personal property assessed grossly excessive in that as appellants allege they did not own personal property in Wichita County on January 1st, 1923, exceeding in value more than $10,000.00, and hence said assessment as made by the board of equalization against the personal property of appellants was excessive by at least $718,300.00 (R. 7-8).

Appellants further alleged that the excessive assessment of $718,300.00 was arrived at by the taxing authorities of Wichita County on the theory that appellants owned lands in Wichita County which were producing oil to the extent that one-eighth of the oil produced and saved from said wells equalled 723 barrels daily, and that one-eighth of the oil produced and saved under the lease contracts that had theretofore been executed by the appellants covering such lands belonging to the appellants was properly assessed as personal property. Appellants alleged that in truth and in fact long prior to January 1st, 1923, W. T. Waggoner had executed oil and gas leases covering all of the said lands in Wichita County on which there were producing wells, which leases were

on January 1st, 1923, valid and subsisting contracts and in full force and effect, and by which leases appellants in consideration of the royalties to be paid to them, had conveyed and leased their entire mineral interests so that on said date there remained insofar as the mineral estate in and to said lands was concerned merely the contractual obligation of the various lessees to deliver when produced and saved the equal one-eighth part of all the oil, and that said contractual obligation was no more than a credit, taxable not in Wichita County, but in the county of appellants' domicile (R. 9-10-22-23-24).

Appellants alleged that the nature, form, terms, and provisions of the various leases executed were substantially identical in legal effect, and attached to their petition as Exhibits A (R. 30), B (R. 33), C (R. 37), D (R. 40) and E (R. 44) what were alleged to be fair samples of the different form leases (R. 22).

Appellants further alleged that there was certain personal property of other persons situated in Wichita County on January 1st, 1923, such as oil well derricks, rod lines, oil well casing in wells, tubing for pumping, engines, pump jacks on leases, gathering lines, storage tanks, boilers, houses and water lines on leases of an aggregate value of more than the sum of $500,000.00 that was intentionally exempted and freed from tax by the authorities of Wichita County, it being alleged that all said property was subject to taxation and legally entitled to bear its proportion of tax in said county, but by the intentional acts of the tax authorities such property was made free, clear and exempt from such taxation (R. 11-12).

It was further alleged that the valuing of plaintiffs' rights as the holder of royalty contracts on the basis of $1,000.00 per barrel of daily production, as was done, was unlawful and discriminatory, in that the production of the producer or lessee on the same land was valued systematically and consistently at $450.00 per barrel (R. 28).

It was alleged that the acts of the tax authorities in respect to the several matters hereinbefore pointed out were purposeful, intentional, systematic, arbitrary, discriminatory and unlawful, not based on facts or evidence, hence fraudulent in law and violative of the rights of the appellants as such rights are given and protected by the due process and equal protection clause of the Fourteenth Amendment of the Constitution, likewise violative of the Texas Constitution and Texas Statutes requiring that all taxes be uniform, equal and non-discriminatory (R. 16).

Appellees' motion to dismiss the Bill was filed, presented and overruled (R. 77).

Appellees in their answer among other things alleged that the appellants by and through their agent, More, rendered the property involved to the tax assessor of Wichita County showing on such rendition that there was a total of 143 producing wells on January 1st, 1923, producing a royalty in amount of 723 barrels, or a total value of $325,350.00, thus separating the royalty or the value thereof from the physical property, and rendering the land or surface rights in separate values, and because of such rendition in such form appellants are estopped from attacking the tax

imposed on such royalty interest (R. 54-55). Appellees by their answer further in detail alleged that there was no unlawful, intentional or arbitrary action on the part of the Commissioners' Court or taxing authorities; that they acted in good faith on adequate and sufficient evidence, and that such acts constituted their honest judgment and belief, in short furnished a pleading that sustains fully all of the contentions asserted by the appellees as to the validity of the tax indebtedness claimed by Wichita County according to the valuations and classifications of the property, as shown on the amended roll (R. 52 to 68).

Appellees in particular alleged that by mistake the item of $723,000.00 assessed against appellants, because of their being royalty owners, was erroneously assessed as personal property on their original rolls and alleged that it should have been assessed as real property and to correct such error a supplemental roll had been prepared, showing the assessment of such item as real property (R. 61). Appellees further alleged that as to certain leases, only seven-eighths of the mineral realty passed to the lessee therein (R. 69) and that one-eighth of all of the mineral rights in and to the lands covered by leases was not intangible property but rather minerals subject to taxation in Wichita County against appellants (R. 70).

STATEMENT OF FACTS

W. T. Waggoner, January 1st, 1923, owned some thirty different tracts of land in Wichita County. Of the different tracts of land so owned there were approximately 23 tracts on which there were oil producing wells. In addition to the lands so owned on January 1st, 1923, he also owned a few head of cattle and horses, wagons, tools and implements (R. 94-95). By instrument of June, 1923, W. T. Waggoner transferred to the W. T. Waggoner Estate all of the personal property, with certain exceptions not herein material, and at the same time conveyed to the W. T. Waggoner Estate all the real estate (R. 144 and 147), said conveyance of real estate reciting that W. T. Waggoner and his wife "do grant, sell and convey unto the said W. T. Waggoner Estate of the County of Tarrant and State of Texas, all lands owned by them in Texas and wherever situated in said state, and all interest and claims of any and every kind or character in said lands including oil and gas rights and interest" (R. 144).

Prior to January 1st, 1923, W. T. Waggoner had executed so-called written oil and gas leases to various so-called lessees, there being 23 different leases covering 23 tracts of land in Wichita County, the leases covering all the lands owned by Waggoner in Wichita County, from which oil was being produced on January 1, 1923. These various leases are shown beginning R. 114 and ending R. 141.

The terms of these respective leases will later be discussed more fully.

Appellants in accord with the request of the Tax Assessor of Wichita County filed with the Tax Assessor in the form requested a list or rendition showing that on January 1st, 1923, Waggoner had 143 producing oil wells producing such quantity as that one-eighth of the total production was equal to an aggregate of 723 barrels for January 1st, 1923. Appellants also listed cattle, horses, wagons, tools and implements of an aggregate value of $4,600.00. The list, instrument, or rendition showed that appellants fixed the value of the rights accruing to them as holders of the obligation of the producer to pay one-eighth of the oil produced and saved (the royalty contract rights) at the figure of $325,350.00 (R. 94).

The Tax Assessor of Wichita County testified that he sent out to tax payers in Wichita County certain printed forms, one of the purposes of which was to procure information from such tax payer as to the amount of production that the tax payer had on each particular piece of land, it being his purpose in the year 1923 to get from each taxpayer that had oil producing wells, whether he be a royalty owner or producer, information as to the amount of oil that each tract of land was producing, showing such production in units of barrels. The purpose of this inquiry was to ascertain the amount of production, which being known could be reduced to money on the tax rolls (R. 81).

The witness further testified that the tax authorities of Wichita County followed a fixed plan of assessing $10.00 per acre for land as distinguished from the

oil interest thereon, and to ascertain the amount of production of each particular tract as of January 1st, 1923, such amount being ascertained by reviewing the production on said land for the three months preceding January 1st, 1923, and which plan, when applied to the land of W. T. Waggoner, showed an amount equivalent to 723 barrels of daily production, which was assessed for taxation purposes at $1,000.00 per barrel (R. 80). It was in this way, and by this calculation that appellants were assessed at the sum of $723,000.00 on the right accruing to them under outstanding royalty contracts appearing as part of the leases.

Appellees introduced in evidence what was termed a supplemental roll on which the item of $723,000.00 here involved was shown as realty (R. 189-194).

The Assessor of Wichita County testified that as to the producer the same method was employed except that a value of $450.00 per barrel of daily production was assessed against the oil of the producers. He testified that in most instances the value of royalty rights calculated at the basis of $1,000.00 a barrel of daily production was added to the $10.00 flat valuation of the real estate, but that such was not true of appellants' rendition because appellants owning several different tracts of land he was unable to determine or know what particular tract of land the production was on or from (R. 81 and 85).

He further testified that he did not require the owners of the equipment of the producing well, such as the casing in the wells, pumps, pipe lines, boilers,

etc., to be listed and rendered for taxation purposes as such, but that such property was considered in connection with the valuation of the producer's oil in charging for production at the rate of $450.00 per barrel daily production (R. 89).

Early in January, 1923, a meeting was called of oil men in the nature of a conference between such oil men and the Commissioners' Court of Wichita County, at which meeting the Assessor testified that he took and heard evidence with reference to the market value of oil and gas leases with the equipment necessary to operate the leases, and upon such evidence he worked out the value at which both royalty interests and the producer's interests were assessed (R. 91).

There were in the neighborhood of 4400 producing wells in Wichita County on January 1st, 1923. Equipment used on and in connection with the producing wells on such date was estimated as in excess of $4,000,000.00 (R. 152).

R. L. More, agent of appellants, testified that when oil is produced out of the well by the lessee that it was put in what is known as a flow tank first where it is guaged, and then turned into the pipe line; that it goes from the flow tank, which is the property of the producer, to the pipeline; that the holder of the royalty rights interest is determined by the measuring or guaging in the flow tank (R. 167); that all a person has after getting his credit slip from the pipeline company is a credit against the pipeline company for so many barrels of oil at a specified gravity (R. 168).

The above in the main is the evidence presented by the record. Such evidence it is true is very meagre, but is designed in a general way to enable this court to better understand the points involved.

Questions Involved

The questions raised in the courts below and here presented are:

I.

Whether the written leases executed by appellants covering the mineral interests in the lands of appellants, passed to the several lessees therein named the entire mineral ~~royalty~~ realty, as is the contention of appellants, or only seven-eighths of such mineral realty, as is the contention of appellees.

II.

Whether the royalty rights reserved by appellants in the instrument, as in the nature of consideration to be thereafter paid by the lessee in the instrument, constitute a mere equitable claim or title to the one-eighth royalty oil when and if thereafter found and brought to the surface by the lessee, as is the contention of appellants, or whether the royalty constituted mineral realty the title to which was in the ownership of appellants as mineral realty, as is the contention of appellees.

III.

Whether, corollary to the foregoing, the property rights of appellants, royalty rights to which they are

entitled under the instrument so executed, constitute personal property for taxation purposes (that is "credits" under Texas Taxation Statutes), as is the contention of appellants, or whether such royalty is real property for taxation purposes, as is the contention of appellees.

IV.

Whether the property rights of appellant, designated as the royalty rights remaining in them after the execution of such instruments (being "credits"), were taxable in the county of the domicile of appellants, as is the contention of appellants, or whether they were taxable in the county in which the lands are located, as is the contention of appellees.

Specifications of Error

Specification Number One

Minerals in place under the ground, by virtue of the Texas law, constitute real estate and may be severed from the remainder of the land by conveyance. Where a part of the consideration in a conveyance of a mineral estate is royalty to be paid or delivered to the grantor or lessor in such conveyance, such royalty, under the Texas law, is personal property—intangible personal property subject to taxation in Texas at the domicile of the owner. The undisputed evidence in this case showing that the appellants had, by instruments in writing, long prior to the tax year 1923, severed their mineral rights from the land involved herein, the Court erroneously dismissed Appellants' Bill of

Complaint attacking the taxation of such royalty rights in Wichita County, a county other than that of appellants' domicile, because under the Texas law such royalties were subject to taxation in Tarrant County, appellants' domicile.

(Based on appellants' First Assignment of Error filed in the United States Circuit Court of Appeals (R. 239), this brief page 53, and on the Seventeenth Assignment of Error filed in the United States District Court (R. 217), this brief page 53.)

SUMMARY OF ARGUMENT

I.

The Federal Courts, in determining the legal effect of instruments in writing relating to property rights, will ascertain and follow the construction placed thereon by the highest courts of the State in which such property is located. (Discussed in this brief at pages 21 to 22.)

II.

Minerals in place under the surface of the ground in Texas constitute realty, and are subject to severance from the remainder of the land by conveyance. (Discussed in this brief at pages 22 to 25.)

III.

Minerals in place under the surface of the earth, under the Texas law, constitute realty for taxation purposes. (Discussed in this brief at pages 25 to 26.)

IV.

The instruments of conveyance involved in this case passed to the lessees or grantees therein named the entire mineral realty in and under the lands covered by such leases and after the execution of such instruments, the property right of the grantor or lessor was the contractual obligation of the various lessees or grantees therein named to deliver the equal one-eighth part of all oil produced and saved after being brought to the surface of the earth. (Discussed in this brief at pages 27 to 47.)

V.

The property right of the grantor or lessor in the various instruments here involved was intangible personal property, a credit under the Texas law taxable at the owner's domicile, Tarrant County. (Discussed in this brief at pages 47 to 52.)

ARGUMENT

Specification Number One

Appellants contend and believe the authorities will demonstrate that the property right which accrued to them under the various leases involved providing for the delivery to them of oil when as and after the same has been produced and saved from the land was personal property within the meaning of the Texas law taxable not in Wichita County but in the county of appellants' domicile. Appellants contend that the item of $723,000.00 which appellees seek to assess

against them is erroneously assessed in Wichita County, such item arising solely from the valuation given to the property right which accrued to the appellants by reason of being the lessor in the various leases here involved, and by reason of holding a mere royalty interest in connection with the execution of such leases.

Appellants assert that upon and after the execution of the various leases covering lands from which the oil was produced, the full, complete and determinable fee title to all of the mineral realty in and under the lands which said leases covered, vested in the lessees or grantees named in such instruments. Appellants, by the execution of the leases or instruments involved divested themselves of all interest in and to the mineral realty in place under the lands, and invested the lessees or grantees in such instruments named with the full and complete determinable fee therein. There remained to appellants, after the execution of such leases, solely and only the property right consisting of the contractual obligation or agreement upon the part of the lessees in such instruments named to do and perform certain acts, among others the agreement to deliver to appellants when, as and after produced and brought to the surface of the earth an equal one-eighth part of all oil produced from such leases. This property right appellants assert was not an interest in land nor even a title to oil until brought to the surface of the earth, hence constituting merely a claim against the lessees in such instrument—a mere equitable title to one-

eighth of the oil produced when, if and after it was brought to the surface of the earth.

The Federal courts in determining the legal effect of instruments relating to real estate, will ascertain and follow the construction placed thereon by the highest courts of the state in which the property is located. This court in the case of *Guffey v. Jos. A. Smith*, 237 U. S. 101, held:

> "It is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—'a freehold interest'—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. Brunev v. Hicks, 230 Illinois, 536, 540, 542; Watford Oil and Gas Co. v. Shipman, 233 Illinois, 9, 13, 14; Poe v. Ulrey, Id. 56, 62, 64; Ulrey v. Keith, 237 Illinois, 284, 290; People v. Bell, Id. 332, 339; Daugherty v. Ohio Oil Co., 263 Illinois, 518, 524. These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights, McGoon v. Scales, 9 Wall. 23, 27; Bucher v. Cheshire Railroad, 125 U. S. 555, 583; Barber v. Pittsburgh & C. Ry., 166 U. S. 83, 99."

The above has been the consistent holding of this court: *Kuhn v. Fairmont Coal Company*, 215 U. S. 360; *Clarke v. Clarke*, 178 U. S. 186. This rule is so firmly established that we deem it unnecessary to

quote or to cite other authorities in support thereof, and with it in mind we approach the consideration of the leases or instruments of conveyance involved in the light of the applicable Texas law.

Minerals in place under the surface of the earth, under Texas law, constitute realty and are subject to severance from the remainder of the land by a conveyance. The Supreme Court of Texas in the recent case of *Stephens County v. Mid-Kansas Oil & Gas Company*, 113 Texas 160; 254 S. W. 290, held:

> "We do not regard it as an open question in this State that gas and oil in place are minerals and realty, subject to ownership, severance and sale, while embedded in the sands or rocks beneath the earth's surface, in like manner and to the same extent as is coal or any other solid mineral.
>
> "The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands. If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own. Ry. Co. v. East, 98 Texas 146, 66 L. R. A., 738, 107 Am. St., 620, 4 Ann. Cas., 827, 81 S. W. 279; Gillette vs. Mitchell, 214 S. W. 622. Ultimate injury from the net results of drainage, where proper diligence is used, is altogether too conjectural to form the basis for the denial of a

right of property in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind, and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.

"The question whether gas and oil in place were capable of separate ownership and sale was carefully considered and finally determined by this court in Texas Company v. Daugherty, 107 Texas 234 to 240, L. R. A. 1917F 989, 176 S. W. 717. The opinion in that case leaves no room for reasonable doubt as to the soundness of the conclusion that gas and oil in place are objects of distinct ownership and sale as a part of the land. Moreover, we regard that view as in harmony with the overwhelming weight of the authorities. The law of Oil & Gas, Vol. 18, Michigan Law Review, p. 59."

The Supreme Court of Texas in considering the above case had under consideration the question as to whether the property right of the lessee in an oil and gas lease in Texas was subject to taxation, and whether such right was taxable as real or as personal property, and as disclosed by the above quoted portion of the opinion reached the conclusion that such estate constituted real property and was subject to taxation as such.

Chief Justice Cureton of the Supreme Court of Texas in the case of *Humphreys-Mexia Company v. Gammon*, 113 Texas 247; 254 S. W. 296; 29 A. L. R. 607, speaking for the Supreme Court of Texas, said:

"It is elementary that the minerals in place may be severed from the remainder of the land by appropriate conveyances. Stephens County v. Mid-Kansas Oil & Gas Co., by this Court, but not yet reported (113 Texas, 160, 254 S. W. 290); Texas Company vs. Daugherty, 107 Texas 226, 235 L. R. A. 1917 F, 989, 176 S. W. 714; State v. Downman, 134 S. W. 787, 795, (writ of error denied); Downman v. Texas, 231 U. S. 353, 58 L. Ed. 264; Washburn on Real Property (5th ed.) Vol. 2, pp. 400, 401; Tiffany on Real Property, Vol. 1, Par. 252, 253.

"The severance may be made by an exception or reservation in the deed. Lyler v. Dodge, 228 S. W. 316, 317; Luse v. Parmer, 221 S. W. 1031, 1032; Luse v. Boatman, 217 S. W. 1096; Wallace v. Hoyt, 225 S. W. 425; DeMoss v. Sample, 143 La. 243, 78 So. 482; Snoddy v. Bolen, 122 Mo. 429, 24 L. R. A. 507, 510, 25 S. W. 932; Tiffany on Real Property, Vol. 1, par. 253, p. 876, Vol. 2, par. 436, p. 1609; Thornton on Oil and Gas (3d ed.) Vol. 1, par. 342, p. 496.

"When the severance is accomplished, each estate, that in the minerals in place, and that in the remainder of the land, may be a free-hold, or an estate in fee simple. Washburn on Real Property (5th ed.), Vol. 2, pp. 400, 401; Tiffany on Real Property, Vol. 1, par. 253, pp. 866, 871; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 13 L. R. A. 627, and cases therein cited, 24 Am. St. 544, 22 Atl. 1035; Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802; Snoddy v. Bolen, 122 Mo. 479, 24 L. R. A. 507, 510, 511, 24 S. W. 142, 25 S. W. 932; see also Texas Company v. Daugherty, 107 Texas, 226, 235, L. R. A. 1917 F, 989, 176 S. W. 717; Houston Oil Co. v. Hamilton, 109

Texas 270, 206 S. W. 817; and Lodwick Lumber Co. v. Taylor, 100 Texas 270, 123 Am. St. 803, 98 S. W. 238."

The Supreme Court of Texas in an earlier case of *Texas Company v. Daugherty*, 107 Texas 226; 176 S. W. 717, in accord with the above decisions held that minerals beneath the surface of the earth may by an instrument in writing be severed from the remainder of the land, and being so severed constitute realty for taxation purposes within the meaning of the Revised Statutes of 1911, Article 7504.

The above expressions of the Supreme Court of Texas conclusively determine that in Texas minerals in place beneath the surface of the earth constitute realty subject to complete severance from the remainder of the land by conveyance. The above decisions have been consistently followed on the point under consideration, and correctly express the law of the State of Texas upon such point at this time.

Minerals in place under the surface of the earth, under the Texas law, constitute realty for taxation purposes. The decisions last above quoted from abundantly support this conclusion. Moreover, it is the statutory law of Texas that minerals beneath the surface of the earth constitute realty for the purposes of taxation in Texas. Article 7504 of the Revised Statutes of Texas, 1911, reads:

"Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements,

> or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

The Supreme Court of Texas, as hereinbefore stated, in *Texas Company v. Daugherty*, 107 Texas 226; 176 S. W. 717, expressly holds that under Article 7504 of the Revised Statutes of Texas, 1911, supra, minerals beneath the surface of the earth constitute realty for taxation purposes.

The above authorities at least to our minds conclusively dispose of the proposition that minerals in place beneath the surface of the earth constitute realty and may be severed from the remainder of the land by appropriate conveyances, and are taxable as realty as against the grantee or lessee in such conveyance.

It is not believed that the appellees in this case will take issue with either of the propositions heretofore advanced, but will contend before this court as they have heretofore, that the instruments of conveyance, or leases involved in this case are not such as pass the entire mineral realty to the lessees therein, but rather that only seven-eighths of the mineral realty passed by such instruments, one-eighth being retained by the lessors, appellants herein.

In view of the position appellees have taken in the courts below, and anticipated here, we deem it advisable to set out the material parts of a fair sample

of the instruments of conveyance here involved. The granting clause in the instruments involved reads:

> "That for and in consideration of the sum of One Dollar, cash in hand paid the receipt of which is hereby acknowledged, and the further consideration of the sum of $4,000.00, to be paid in oil produced from said premises, said payment to be made not later than the tenth day of each month, for the preceding month, and not less than one-fourth of the oil so produced to be applied on this indebtedness, and the covenants and agreements hereinafter set out to be kept and performed by the lessee, *have granted, demised, leased and let and by these presents does demise, lease and let unto the lessee,* for the sole and only purpose of drilling and mining for gas and oil, the following lands, in Wichita County, Texas." (Italics ours.) (R. 30.)

Further in said instrument, but not in the same sentence nor even in the same paragraph with the granting clause, is found the following:

> "In consideration of the premises, the lessee covenants and agrees:
>
> "To deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced and (save from) said premises, said settlement to be made not later than the tenth day of each month for the preceding month" (R. 32).

Bearing in mind that in Texas minerals beneath the surface of the earth constitute realty and are subject to complete severance from the remainder of

the land, and that minerals beneath the surface of the earth under the Texas law are subject to taxation as realty, the next question presented is as to whether the instruments involved in this case passed to the various lessees therein named the full and complete title to the mineral estate beneath the surface of the earth. Appellants submit that, construed in the light of Texas law, the instruments involved passed the entire mineral estate to the lessee or grantee therein named, and that thereafter the lessor, appellants in this case, have only the contractual obligation of the various lessees in said instruments named, to-wit, certain acts among which is the delivery, after it is produced and saved, of the equal one-eighth part of all oil. Article 1105 of the Revised Statutes of the State of Texas reads:

> "All alienations of real estate, made by any person purporting to pass or assure a greater right or estate than such person may lawfully pass or assure, shall operate as alienations of so much of the right and estate in such lands, tenements or hereditaments as such person might lawfully convey; but shall not pass or bar the residue of said right or estate purporting to be conveyed or assured; nor shall the alienation of any particular estate on which any remainder may depend, whether such alienation be by deed or will, nor shall the union of such particular estate with the inheritance by purchase or by descent, so operate as to defeat, impair or in any wise affect such remainder."

Article 1106 of the Revised Statutes, 1911, of the State of Texas, reads:

> "Every estate in lands which shall hereafter be granted conveyed or devised to one, although other words heretofore necessary at common law to transfer an estate in fee simple be not added, shall be deemed a fee simple, if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law."

The statutory law of Texas, as above pointed out provides, in the absence of words of express limitation that a fee simple estate passes. The estate conveyed is deemed to be a fee simple unless expressly limited. What words of limitation are found in the granting clause in the leases here involved? The granting clause expressly grants, demises, leases and lets the entire mineral estate, the consideration therefor being the covenant and agreement upon the part of the lessee to deliver to the lessor free of charge in the pipeline to which said lease may be connected the equal one-eighth part of all oil and gas produced and saved from said premises. There is no reservation of any interest beneath the surface of the earth. The agreement, as evidenced by the instruments involved, is that the lessee is to deliver the equal one-eighth after the oil is produced and saved. Article 7504 of the Revised Statutes of Texas, 1911, supra, expressly provides that minerals beneath the surface of the earth shall constitute realty. There is no reservation to the lessor in the leases involved of anything beneath the surface of the earth. The sole interest left

to the lessor, the appellants in this case after the execution of the instruments involved, is the covenant or agreement on the part of the lessees to deliver, after produced and saved, the equal one-eighth part of the oil. There is no inconsistency between the granting clause and any other clause of the instruments involved. The granting clause conveys the entire mineral interest. The consideration for such conveyance being not a reservation of one-eighth of the oil beneath the surface of the earth, but rather the covenant or agreement upon the part of the lessee to deliver the equal one-eighth part of the oil produced and saved.

The instruments of conveyance in this case clearly show that the intent of the parties was to pass to the lessee the full eight-eighths interest to the mineral realty beneath the surface of the earth.

It is a well defined rule of property in Texas that in case of conflict between the granting clause in an instrument of conveyance and other clauses, that the granting clause will prevail. It is not believed that there is any inconsistency whatsoever in this case between any portion of the instruments under consideration, but even if it could be said that there is any inconsistency between the granting clause which purports to convey and pass the entire mineral realty and the covenant of the lessee to deliver after produced and saved the equal one-eighth part of the oil, the granting clause will prevail.

The Circuit Court of Appeals, Fifth Circuit, from

which court this case comes, in *Kynerd v. Hulen*, 5 F. (2nd) 160, said:

> "Each of the deeds attacked is a full warranty deed. The granting clause described land and not an easement. There is a suggestion that the words 'upon, over and across' in the granting clause refer to the land; but in our opinion they have reference to the railroad track, and there is nothing in the granting clause to sustain the theory that only an easement was intended to be conveyed. In construing any contract, the intention of the parties governs; and that rule is to be observed in construing a deed. Eery part of it must be given effect, if that can be done. *But since the purpose of the granting clause of a deed is to define and designate the estate conveyed, in case of conflict it prevails over other clauses.* 8 R. C. L. 1044. That rule was recognized by this court in the Alabama case of Dickson vs. Wildman, 183 Fed. 398, 105 C. C. A. 618; *and prevails in Texas.* Moore vs. City of Waco, 85 Tex. 206, 20 S. W. 61." (Italics ours.)

The Texas courts expressly recognize as a rule of property in Texas that the granting clause in an instrument of conveyance shall be given controlling effect.

The Court of Civil Appeals at Austin, Texas, in the case of *Grogan et al. vs. City of Brownwood*, 214 S. W. 532, lays down this rule:

> "It is a sound rule of construction that when a particular thing has been granted by apt terms of conveyance, a reservation or restriction which might result in destroying the subject matter

> of the conveyance will be declared void and ineffectual. In other words, a restriction or limitation will not be permitted to stand if its effect is to remove the subject matter from the granting clause of the conveyance."

The Court of Civil Appeals of Texas in the case of *Burgess, et al, v. McCommas, et al,* 129 S. W. 382, in which a writ of error was denied, said:

> "It is a well settled rule of construction in this state, as we understand the decisions, that, if there is a limitation clause in a deed which is repugnant to and irreconcilable with its consistent granting, habendum, and warranty clauses, it should be rejected, and the intention of the parties determined from the other clauses."

The Supreme Court of Texas in the case of *Moore v. City of Waco,* 85 Tex. 211, says:

> "The governing rule in the construction of written instruments is, 'that every part of the instrument should be harmonized and given effect to if it can be done.' Hancock v. Butler, 21 Tex. 806.
>
> "But this rule does not demand that every part of the deed shall be treated as of equal weight in the solution of every question that may arise. 'The habendum may be entirely rejected if repugnant to the other clauses of the conveyance.' Dev. on Deeds, Sec. 213.
>
> " 'A person who is not named in the premises as a grantee may take by way of remainder; but where the grant is to one person, the habendum cannot be operative when it is to him and

another to take as joint tenants in common.' Id., sec. 219.

" 'If, however, there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former; but if they can be construed so as to stand together, by limiting the estate without contradicting the grant, the court always gives that construction in order to give effect to both.' "

Article 1106 of the Revised Statutes of Texas providing that in the absence of words of express limitation that it shall be deemed that a fee simple passes, and the courts of Texas announcing as a rule of property that the granting clause shall be given preference in determining the estate conveyed, and the granting clauses in the instruments in this case being wholly without limitation, we see no escape from the conclusion that the entire eight-eighths of the mineral realty in and under the lands which the leases in question cover passed to the lessees therein named.

The decisions of the State of Texas construing the estate which passes by the execution of an oil and gas lease are entirely in harmony with the above conclusions and lend their support to such conclusions.

The Supreme Court of Texas has recently held that a severance of the mineral realty is perfected by an instrument in writing whether the instrument take the form of a grant of the exclusive right to mine and appropriate all of a certain mineral or takes the form of a demise of the land for the sole purpose of mining operations coupled with the granting of the exclusive

right to produce and dispose of the mineral, or takes the form of a grant of the mineral with the exclusive right to mine for, produce and dispose thereof. This holding was made by the Supreme Court of Texas in the case of Stephens County v. Mid-Kansas Oil & Gas Company, supra, in which case the Mid-Kansas Oil & Gas Company sought to enjoin Stephens County and its tax officials from the collection of taxes, which said officials had assessed and levied against certain oil interests claimed to be owned and held by the Mid-Kansas Oil & Gas Company. The ownership of the oil rights of the Mid-Kansas Company were such and only such as accrued to them as lessee under an oil and gas lease executed by a land owner on land located in Stephens County. The lease therein involved contained among other things these recitals:

> "First parties (Hill and wife) in consideration of $41.00 let and lease to second party the land in question, hereby granting to second party full and exclusive authority to enter upon said premises and to dig, drill, operate for and procure natural gas and petroleum together with the right of taking upon said premises and removing therefrom at pleasure any machinery, tools, etc., necessary for said work, etc.
>
> "In the event of the sale or marketing of petroleum, second party shall deliver as royalty to first parties, in tanks near the mouth of the well or wells, without cost to the first parties one-eighth (1/8) of such products, or pay the market price in cash thereof, at option of second parties, and the remainder of such product shall belong to the party of the second part.

"If gas is discovered in paying quantities on said premises, first party shall have gas free for domestic purposes for one house now on said premises.

"It is agreed by the parties hereto, that all the terms and conditions of this lease shall extend to and be binding on their heirs, executors and assigns."

The Supreme Court of Texas after pointing out as a rule of law of the State, that gas and oil in place are minerals and realty subject to ownership, conveyance and sale while embedded in the sand or rocks beneath the earth's surface, said:

"Notwithstanding the distinctions attempted to be drawn in the decisions, we cannot conclude otherwise than that there is no real difference in the title conveyed, whether an instrument takes the form of a grant of the exclusive right to mine and appropriate all of a certain mineral—as in Stoneridge v. Hunt, supra—or takes the form of a demise of the land, for the sole purpose of mining operations, coupled with a grant of the exclusive right to produce and dispose of the mineral—as in this case—or takes the form of a grant of the mineral with the exclusive right to mine for, produce, and dispose thereof—as in Texas Company v. Daugherty, supra. The results are substantially the same to all parties at interest, whether the one or other form of instrument be used. Why hold that instruments in different forms create different estates, where there is no difference in fact with respect to that of which each divests the grantor, his heirs or assigns, nor with respect to that with which each invests the grantee, his heirs or assigns?"

The leases involved in this case are to our minds no different in legal effect from the lease which the Supreme Court of Texas had under consideration in the case last above quoted from, and clearly the conclusion reached by the court with reference to the attempted distinction sought to be made between different forms of leases with respect to the estate conveys brings the leases here involved within that class of instruments effecting a complete severance of the minerals.

It is recognized that the Mid-Kansas case, supra, was not one in which the Supreme Court was dealing directly with the character and nature of the title of the land owner in the property after the execution of the lease, nor the nature and character or proper classification of the land owner's property after the execution of leases represented in the lessee's obligation to the land owner to deliver oil in certain proportions when and as and after produced; but the Supreme Court of Texas in the Mid-Kansas case was deciding and did decide the question as to where the title to the mineral estate was after the execution of such lease, and concludes, as we submit, that the complete mineral title to all minerals under the ground passed to the lessee.

This view is strengthened by a consideration of those decisions of the courts of Texas discussing the nature of oil royalty. Decisions having the stamp of approval of the Supreme Court of Texas have held that royalty is personal property. Such decisions when considered in the light of and in connection

with the Mid-Kansas case, supra, reveal the exact nature and classification of the property right of the grantor or lessor in oil and gas conveyances or leases; and as will appear from the reading of such decisions this property right is personal property and not an interest in the realty.

The Commission of Appeals, Section A, in an opinion which Chief Justice Cureton of the Supreme Court adopted and entered as the judgment of the Supreme Court in the case of *Jones v. O'Brien*, 251 S. W. 208, had under consideration a case in which it became necessary for the Court of Civil Appeals to pass on the nature and classification of the land owner's property rights arising to him in consideration of the execution of an oil and gas lease, and in this case the Commission of Appeals affirmed the decision of the Court of Civil Appeals holding that this property right was personalty. The question presented in the Jones v. O'Brien case, supra, involved the issue as to whether a contract relating to the sale and purchase of royalties had to be in writing to escape the statute of frauds. The Court of Civil Appeals of Texas in its opinion held that a contract relating to royalties need not be in writing, as such property right was personalty, and that the statute of frauds does not apply. Upon this point the court said:

> "The fact that this deed was attached to the petition would not have the effect to change a contract for the whole of the interest conveyed by it, in the absence of an allegation to that effect, so construing the petition to allege the contract to convey royalty, *and royalty being*

personalty the statute of frauds does not apply. Bender v. Brooks, 103 Texas 333, 127 S. W. 168; Ann. Cas. 1913 A 559; Hulse v. Hulse, 155 Ill. App. 433. We are therefore of the opinion that in those respects the petition states a good cause of action." (Italics ours.)

The Commission of Appeals of Texas, Section A, in the case of *Hogg v. Magnolia Petroleum Company, et al*, 267 S. W. 482, held that royalty was personal property. The Court said:

"Oil in place in the ground is real estate, and may be severed from the remainder of the land by conveyance. Humphreys-Mexia Company v. Gammon, 113 Texas 247, 254 S. W. 296, 29 A. L. R. 607. When Hogg executed the lease to W. H. and D. W. Powers, he conveyed to them a determinable fee to the oil and gas in place. Texas Company v. Davis, 113 Texas 321, 254 S. W. 304, 255 S. W. 601. There remained, however, the possibility of reverter to Hogg, which he could by deed convey. Robinson v. Jacobs, 113 Texas 231, 254 S. W. 309; Carruthers v. Leonard (Tex. Com. of App.), 254 S. W. 779; Queen v. Turman (Tex. Com. of App.), 257 S. W. 1092. As part of the consideration for the conveyance of this mineral estate, the grantee agreed to deliver to Hogg, in the pipe line to which the wells should be connected, a one-eighth part of all oil produced and saved from the leased premises. This consideration, which was to be so paid to Hogg, is termed his royalty interest. When Hogg executed the transfer to Kimsey, he thereby conveyed to him a one-thirty-second undivided interest in his possibility of reverter, and also a one-thirty-second part of the

> oil when produced and delivered in the pipe line. When so run, it was, of course, personal property."

This decision by the Commission of Appeals was adopted by the Supreme Court and entered as the judgment of the Supreme Court.

The Court of Civil Appeals of Texas, Second District, at Fort Worth, Texas, in the case of *Curlee v. Anderson & Patterson*, 235 S. W. 622, held in line with the decisions above quoted holding in substance that royalty was personal property.

Appellants submit that as shown by the decisions above, in Texas the royalty to be paid to a grantor or lessor is personal property. Being personal property no other conclusion can be drawn than that the grantor or lessor by reason of his instrument of conveyance parted with his entire mineral realty.

The Mid-Kansas case, supra, holds unequivocally that regardless of the form of the instrument of conveyance, the execution thereof passes to the grantee or lessee the mineral rights in and to the premises covered by the lease. The Mid-Kansas case does not define or classify the property right of the grantor or lessor in such lease, but such right has been defined in decisions approved by the Supreme Court of Texas, as has heretofore been shown, in which decisions the property right of the grantor or lessor is held to be personal property—the mere contractual obligation of the grantee or lessee to do and perform certain acts in said grant or lease contained.

We cannot perceive how any other conclusion can be reached after reading the above decisions, than that the appellants in this case had after the execution of the leases in question, any other property right in and to the minerals in the lands covering which leases had been executed, than the mere contractual obligation on the part of the various lessees therein to deliver one-eighth of the oil produced and saved, which right is no more than personal property.

We submit that in this conclusion we are supported by the decisions of the highest tribunals of the State of Texas.

We deem it advisable to review briefly the opinion of the Circuit Court of Appeals in this case, believing that a discussion of this opinion will shed light upon the contentions appellants make. The Circuit Court of Appeals in its opinion said:

> "Minerals in place may be severed from the remainder of the land by appropriate conveyance. Humphreys-Mexia Co. v. Gammon, 254 S. W. 296. As to one-eighth of the oil in or under the land described, the leases contain no words of transfer or conveyance or any language indicating that in any contingency the lessor was to cease to be the owner thereof or that the lessee was to have or to be entitled to acquire, any right or title thereto. Each of those instruments had the effect of providing for a working arrangement for drilling and mining for gas and oil in or under described land, the lessee incurring the obligation to deliver to the lessor free of charge in the pipe line to which said lease was

to be connected, the equal one-eighth part of all the oil and gas produced and saved from said premises. No provisions was made for the lessee becoming the owner of the part of the oil produced which was required to be delivered to the lessor. In this respect the instruments in question are materially different from the one which was under consideration in the case of Stephens County v. Mid-Kansas Oil & Gas Co., 254 S. W. 290." (R. 236.)

The Circuit Court of Appeals, it will be noted, as to the contention here made, held that the leases involved in this case did not pass but seven-eighths interest in and to the minerals under ground; that one-eighth part of the oil was reserved to the lessor.

Appellants assert that in the first place this holding of the Circuit Court of Appeals ignores the statutory provisions of the law of Texas, as well as the settled decisions of Texas to the effect that the granting clause in an instrument of conveyance is controlling. The granting clause in the instruments of conveyance herein involved grant to the respective lessees the entire eighth-eighths. There is no limitation in the granting clause as to any part of the minerals. There is, to be true, but not in the granting clause nor even in the paragraph with the granting clause, an agreement on the part of the lessee to deliver to the lessor the equal one-eighth part of all the oil and gas produced and saved from said premises, which is merely *a consideration for the grant of the entire minerals*, the right of the lessors in these instruments of conveyance to the one-eighth part of all the oil, does not

obtain until the oil has been brought to the surface and saved. The right of the lessor to possess the oil does not obtain until the time it becomes and is personal property. On January 1, 1923, the date involved, all of this oil was under ground in place, and being under ground, was realty, the title to this oil being in the lessees. The granting clause, as we submit, being of controlling effect, the Circuit Court of Appeals misapplied the Texas law when it held as has been quoted above.

Moreover, the Circuit Court of Appeals in that part of its opinion quoted above greatly erred on a vital point in that it fails to follow the rule of construction announced by the Texas courts wherein the Texas courts hold, as we have hereinbefore set out, *that royalty is personal property.* The Statutes of the State of Texas, Article 7504, provides that minerals beneath the surface of the earth are realty. The courts of Texas hold that royalty is personalty, and hence no part of the minerals under the surface is retained by the lessor merely because he is entitled to a royalty. We believe that without question the holding of the Circuit Court of Appeals, as above set out, is contrary to and in conflict with the established rule of law with reference to the nature of royalty, as such rule of law has been announced within the jurisdiction of Texas.

It is respectfully urged that the Honorable Circuit Court of Appeals fell into error in its opinion in this case in giving weight or attaching importance to the fact that under the lease in the Mid-Kansas-

Stephens County case the lessee had the right, at his option, to purchase the royalty oil. An examination of the group of oil decisions decided by the Supreme Court of Texas in 1923, of which the Mid-Kansas-Stephens County case was only one, will disclose, we think, that the option of the lessee to buy the royalty oil was not even considered a factor of importance in the conclusion of the Supreme Court that the form of lease vested in the lessee the fee title to the mineral estate subject only to reverter for breach of the lessee's obligations.

If it be true that the royalty rights are mere personalty for all purposes, including taxation, and the lessee's estate is the full eighth-eighths of the oil in the land where the instrument gives the option to the lessee to buy the royalty oil when and if produced, it should be equally as true that such is the proper classification of the property of lessor and lessee, respectively, regardless of the mere option of the lessee to buy the royalty oil if found and saved.

The Texas courts, as we have set out hereinbefore, hold that an oil and gas lease, regardless of the form, passes to the lessee an interest in the realty that the lessee has more than a mere option or privilege. The Texas courts so hold, and taking this holding as a premise, it follows that the royalty or consideration moving to the lessor for such conveyance is not realty, but rather the obligation of the lessee to do certain acts. This obligation, true, is a property right and

is taxable, but not as real estate. We say that this property right of the lessor is personal property, and under the Texas law, a credit taxable at the domicile of its owner.

By Texas law, the vendor of land who sells on credit or part credit, taking the obligation of his vendee to pay money as purchase price without reserving an express vendor's lien for security yet not waiving the lien, has an equitable right in or claim to the land. (*Liberto, et al, v. Sanders, et al*, 248 S. W. 120, Loc. Cit. bottom column 1, p. 122.) This obligation of the vendee to pay the vendor, whether the obligation be evidenced by note or otherwise, is confessedly a mere chose in action or "credit," within the meaning of the Texas Taxation Statutes. The legal title passes to and vests in the vendee who must pay the taxes on the land thus vested in him, though the tax authorities should, and no doubt would, value that estate having in mind the outstanding obligation to the vendor. No confusion or difficulty would be encountered in applying the taxation statutes to this situation. By the Texas rule relating to oil leases we assert the situation, in the eye of the law, is not different as to the case at bar. The leases here passed to the lessees the full and complete title to the entire mineral estate subject to reverter only in event of breach of the obligations of the lessee. (*Texas Company v. Davis*, 113 Texas 321; *Robinson v. Jacobs*, 113 Texas 231; *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160; *Munsey v. Marnet Oil & Gas Co.*, 113 Tex. 212; *Thomason v. Ham*, 113 Tex. 239.) The lessee was under the obligation,

as the consideration for the conveyance to him, to deliver to the lessor, the land owner, one-eighth of the oil if the lessee explored, found oil, brought it to the surface and saved it. As shown at page 27 in this brief, the instruments in question, after granting the mineral estate, expressly say that in consideration thereof "the lessee covenants and agrees to deliver to the lessor, free of charge in the pipe lines, the equal one-eighth part of all the oil and gas produced and saved from the premises." The lessee acquired the full title to all the oil—the whole eighth-eighths—and could exclude everyone from right therein or possession thereof, even the lessor himself, until such time as the oil was found, mined, and brought to the surface, whereupon the lessor then, but not before then, could claim his one-eighth, which, of course, at that time would be only personal property. The lessor, hence, had no other or greater right or claim, under his royalty contract, than merely an equitable title to such one-eighth of the oil as personal property if and when produced; he did not have oil nor anything but a mere contract right on January 1, 1923. It is submitted that the lessor's right to exact the delivery to him of the possession of the one-eighth of the oil is no different, on the question of classification of the character of property that lessor's royalty contract was, than if he had held the written obligation of "A" to deliver to him one-eighth of the oil that "A" might produce in the future, if he found it on the land of "B", mined it and brought it to the surface. In other words, the contract right of appellants in the instant case, in pursuing the inquiry to deter-

mine the character of property that the contract right is, is no different than if appellants had the contract right of "A" to deliver to them a definite part of the oil that "A" might produce from the land of "B" deliverable when "A" should find the oil on the land of "B", bring it to the surface and save it. Under the illustrated situation the appellants admittedly would have no realty interest in the land of "B" that would be taxable against them under the Texas law. Justice, under the law, is accomplished by taxing the lessee's mineral estate (eight-eighths) at its value, having in mind his outstanding obligation to deliver to the lessor the one-eighth of all oil he might find, bring to the surface and save, and by taxing the lessor, with the value of the royalty right to be paid or receive the one-eighth of the oil when, if, and as produced and run to the pipe line. The one contemplates the taxation of mineral realty; the other the taxation of personalty. The one must be taxed in the county where the mineral realty is located; the other must be taxed in the county of the domicile of the personalty owner. The tax rate in the different counties may, of course, under Texas law, as to county rate, school district rate, road district rates, etc., differ widely, thereby affecting substantially the tax obligation of the tax payer, depending on the county by which the tax levy and assessment is made.

If the appellants are correct in the position taken above, they, after the execution of the leases involved, owned a property right taxable not in Wichita County, but rather in Tarrant County, their domicile.

Article 7505 of the Revised Statutes of 1911 reads:

"Art. 7505. (5063) Personal Property includes what.—Personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debts owned by citizens of the state, whether the same be in or out of the state; all ships, boats and vessels belonging to inhabitants of this state, if registered in this state, whether at home or abroad, and all capital invested therein; all moneys at interest, either within or without this state, due the person, to be taxed over and above what he pays interest for, and all other debts due such person over and above their indebtedness; all public stock and securities; all stock in turnpikes, railroads, canals and other corporations (except national banks) out of the state, owned by inhabitants of this state; all personal estate of moneyed corporations, whether the owners thereof reside in or out of this state, and the income of any annuity, unless the capital of such annuity be taxed within the State; all shares in any bank organized or that may be organized under the law of the United States; all improvements made by persons upon lands held by them, the title to which is still vested in the state of Texas, or in any railroad company, or which have been exempted from taxation for the benefit of any railroad company, or any other corporations, or any other corporation whose property is not subject to the same mode and rule of taxation as other property."

Artcle 7506 of the Revised Statutes of Texas defines the term "Credit" as follows:

> "Art. 7506 (5064) Definition of Terms. 'Credits.' The term, 'Credits,' wherever used in this title, shall be held to mean and include every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due."

The property right of the appellants on January 1, 1923, the date fixed by the law of Texas for determining the taxable status of the taxpayer for the year, was the contractual obligation of the various lessees in the leases involved, to deliver when, as, and after produced and saved, the equal one-eighth part of all oil. On January 1, 1923, appellants had no oil, and their property right on that date consisted merely in the rights given to them by the contracts of conveyance which had theretofore been executed. This contractual obligation, appellants assert, was intangible personal property or a credit within the terms of the Texas law, and was taxable in the county of appellants' domicile, not in Wichita County.

A credit, as above stated, under the Texas law is defined to include every claim and demand for a valuable thing.

Appellants on January 1, 1923, insofar as the royalties were concerned, had no more than a claim for a valuable thing, and if appellants are correct in the contentions heretofore made, to the effect that the entire eight-eighths had passed to the lessees in the leases concerned, a reading of the statutory law of

Texas relating to taxation, which has heretofore been set out, classifies their property as personalty—intangible personalty.

Intangible personal property in Texas is taxable in the county of the owner's domicile. The Supreme Court of Texas on this question in the case of *Ferris v. Kemble*, 75 Texas 476, 12 S. W. 689, announced this rule:

> "Intangible personal property, such as credits, are taxable only at the place of residence of the owner, without regard to where they are kept or deposited, and equally without regard to how they were earned or to the place of residence of the debtor."

Cooley on Taxation, Vol. 2, 4th Ed., Sec. 455, defines intangible personalty:

> " 'Intangible' personalty includes open accounts and bills receivable, credits whether or not evidenced by writing, promissory notes, mortgages (considered as personalty), bonds, shares of stock, deposits in banks, judgments, and the like, where the debt or obligation is the real thing."

Appellants had only the obligation of the various lessees on January 1st, 1923. Appellants on such date did not own any physical property, their sole property being the obligation—the covenant or agreement of the various lessees to deliver when produced and saved, the equal one-eighth part of the oil.

Cooley says above, that intangible personal property includes every property right where the debt or

obligation is the real thing. Appellants assert that applying this rule to the facts of this case, that clearly their property right on January 1, 1923, was intangible personalty, the obligation of the lessees being the real thing, and under holdings of the Supreme Court of Texas this property right is taxable at their domicile.

The Supreme Court of Minnesota, for taxation purposes has, insofar as personalty is concerned, statutory law practically the same as Texas, and defines "credits" practically in the identical language as used by the statutes of the State of Texas. Bearing this in mind, and turning to the case of *State v. Rand*, 40 N. W. 835, by the Supreme Court of Minnesota, we find the following facts, which are persuasive here:

A contract was entered into between four persons and the corporation, whereby the four persons agreed in writing to sell to the corporation a certain piece of property, a small part of the consideration being paid down. The corporation agreed in the same writing to pay the balance of the purchase price on certain specified days, and possession of the property involved was delivered to the corporation.

The State of Minnesota attempted to assess against the vendors in the contract, the consideration which the corporation agreed to pay, contending that within the terms of the Minnesota law the obligation of the corporation to pay, was credits. Credits within the terms of the Minnesota law at that time, were held to mean and include every claim and demand for money or other valuable thing, and every security or

sum of money receivable at stated periods due or to become due, and all claims and demands secured by deed or mortgage due or to become due. This is practically the identical language of the Texas statute defining credits. The Supreme Court of Minnesota upon the facts, said:

> "In the case at bar it will be observed that no notes were executed by the purchaser, nor did the vendors enter into a bond for a deed. The contract contains the bargain; the corporation covenanting absolutely, in words, upon its part to pay upon days certain, and the vendors in equally as formal and binding a manner agreeing to convey the premises upon receiving a part only of the purchase price. There were but two things which could possibly prevent the vendors from receiving their money: *First*, their inability to give a perfect title to the premises; and, *second*, the insolvency of the vendees. We must assume the solvency of the latter, and with equal confidence can presume that the vendors will be able to convey when the time comes, in accordance with their contract. We then have the written promise of the purchaser to pay and the agreement of these defendants to deed. * * * If such sum be the debt of the club, it must be a credit in the hands of those to whom it is owing."

Appellants here have the same situation presented. While no notes were executed they did have the covenant of the various lessees to deliver after brought to the surface of the earth, the equal one-eighth part of the oil. This, we contend, is a credit within the terms of the Texas law just as was the obligation of

the corporation a credit within the terms of the Minnesota law.

Appellants respectfully submit that the item of $723,000.00 assessed as realty against them is erroneously assessed as such, because such property right was intangible personal property, taxable solely and only in Tarrant County, appellants' domicile, and assert that the judgment of the District Court is erroneous in not so holding.

CONCLUSION

We respectfully submit that the tax obligation asserted by Wichita County against appellants for 1923 violated the requirements of the law calling for a uniform and equal taxation and was created and asserted in violation of the Texas Constitution and in violation of the rights afforded by the Constitution of the United States, and ask that the decree of the District Court be reversed and judgment here rendered or direction here given for the entry of the decree that will fully protect and preserve appellants' rights.

J. H. BARWISE, JR.,
THOMPSON, BARWISE & WHARTON,
Attorneys for Appellants,
Fort Worth, Texas.

(Signed) J. H. BARWISE, JR.
of Counsel
Fort Worth, Texas.

ASSIGNMENTS OF ERROR

1.

The decree entered in this cause by the Circuit Court of Appeals, Fifth Circuit, affirming the decree of the District Court in and for the Northern District of Texas is erroneous in holding and deciding that oil royalty interest is real property, for that the undisputed evidence discloses that on the first day of January, 1923, the taxable year involved, that appellants had by proper leases conveyed all mineral rights in and under the surface of lands in Wichita County to various lessees, retaining a one-eighth royalty, which under the Texas statutes relating to taxation, and under the decision of the highest tribunals of the State of Texas, was a credit taxable as personalty, not in Wichita County but in the County of appellants' domicile (R. 239).

2.

The Court herein erred in finding against the plaintiffs herein and dismissing the plaintiffs' bill of complaint, for the reason that the undisputed evidence shows that on January 1st, 1923, and prior thereto the said plaintiffs, and especially the said W. T. Waggoner, had by proper leases conveyed the minerals in and under the surface of his lands in Wichita County to various lessees, said leases, however, giving the said plaintiffs, and especially the said W. T. Waggoner, a one-eighth royalty or interest in the oil that the said lessees might find in said land. Now, then, this being true, plaintiffs say that this one-eighth in-

terest, or royalty, under the undisputed facts herein was not realty or real estate as contended for by the defendants, and as held by the Court, but that the same, under the Texas statutes on taxation became a credit and was a credit and taxable as personalty only in the manners and ways as provided for by the same as realty, and hence erred in dismissing the plaintiffs' Bill of Complaint, for under the undisputed facts in this case and under and by virtue of the terms of the leases in question the said plaintiffs' one-eighth interest, or royalty, was a credit within the terms of the Texas statutes on taxation (R. 217).

Office Supreme Court, U. S.
FILED
MAY 10 1928
WM. R. STANSBURY
CLERK

NO. [redacted] 52

IN THE

Supreme Court of the United States

W. T. WAGGONER ESTATE, and W. T. WAGGONER,
Appellants

VS.

WICHITA COUNTY, B. D. SARTIN, H. H. HAYNES,
Appellees.

APPEALED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF APPELLEES

T. R. BOONE,
E. W. NAPIER,
E. L. FULTON,
E. T. DUFF,
JOHN B. KING,
Attorneys for Appellees,
Wichita Falls, Texas

BULLINGTON, BOONE, HUMPHREY & KING,
Wichita Falls, Texas
Of Counsel.

INDEX

	Pages
Statement of the Case	1- 7
Counter Point No. One	8
Counter Point No. Two	8
Argument	8-35
Conclusion	36

AUTHORITIES

Associated Oil Company, et al vs. Hart, 277 S. W. 1043-1044	21-22
Bouveir's Law Dictionary, Vol. 2, Page 1528	29
Columbus Railway Co. vs. William A. Wright, 151 U. S. 470-479-482; 38 L. Ed. 238-243-244; 14 Sup. Ct. Rep. 396	4- 5
Constitution of Texas, Art. 8, Sec. 11	28
Dowman vs. State of Texas, 231 U. S. 353, 58 L. Ed. 264	31-32
General American Tank Car Corporation, et al vs. Udora S. Day, Supreme Court Advance Opinions No. 9, dated March 15th, 1926, Pages 239-240; 70 L. Ed.	5
Guffey vs. James A. Smith, 237 U. S. 101	9
Humphreys-Mexia Co. vs. Gammon, 113 Tex. 247; 254 S. W. 296	10
Japhet vs. McRae, 276 S. W. 669	18-19-20-30-34-35
Jones vs. O'Brien, 251 S. W. 208; 274 S. W. 242; Advance Sheet, dated April 14th, 1926, No. 3, Vol. 280, Southwestern Reporter, Page XV	6-7-25-26-27-28-31-34-35
Koeningheim vs. Miles, 67 Tex. 113	23
Liberto, et al vs. Sanders, et al, 248 S. W. 120	28
Louisville & Jeffersonville Ferry Company vs. Commonwealth of Kentucky, 188 U. S. 385, 398; 47 L. Ed. 513, 519	34
Revised Civil Statutes of Texas, Articles 7504 and 7506	8-10-28-29-32
State vs. Rand, 4 N. W. 835	32
State vs. Royalty Mineral Association, 156 N. W. 128-130	33-34
Stephens County vs. Mid-Kansas Oil & Gas Co., 113 Tex. 160; 254 S. W. 290	10-11-12-13-16-17-18-19-20-24
Texas Company vs. Daugherty, 107 Tex. 226, 176 S. W. 717-719	10-20
United States vs. Noble, 237 U. S. 74; 35 Supreme Court Reporter 532; 59 L. Ed. 845	31-34-35
Words and Phrases, 2nd Series, Vol. 4, Pages 328 and 329	29
W. T. Waggoner Estate, et al vs. Wichita County, et al, 298 Fed. 821; 3 Fed. 2nd. Series 964	17

NO. 332

IN THE

Supreme Court of the United States

W. T. WAGGONER ESTATE, and W. T. WAGGONER,
Appellants

VS.

WICHITA COUNTY, B. D. SARTIN, H. H. HAYNES,
Appellees.

APPEALED FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The appellants' statement of the case, in outlining the issues originally presented, and in stating the material facts, is substantially correct and the appellees adopt the same.

We think it pertinent, however, at the outset to direct this Honorable Court's attention to the fact that

appellants' brief presents for the consideration of this Court only one question. In other words, the entire brief of the appellants is predicated upon one specification of error. Under this specification of error, the appellants primarily contend that the leases involved in this case severed all the minerals in and under the land belonging to the appellants and vested the title of the minerals in place in the lessees. The appellants then contend that the right of the lessor (the appellants) to have the one-eighth of the oil when produced from the land is a mere credit and intangible personal property of the appellants, and taxable under the laws of the State of Texas in the county of the appellant's residence.

The point that we desire to make is in connection with appellants' assertion of jurisdiction of this court and of the involvment in this case of a question arising under the Constitution of the United States.

In the United States District Court for the Northern District of Texas, and also in the United States Circuit Court of Appeals for the Fifth Circuit, the appellants made complaint that, in other particulars, the action of the appellees violated appellants' rights in contravention of the First Section of the Fourteenth Amendment of the Constitution of the United States, and in violation of the tax laws of the United States which guarantee equality and uniformity of taxation.

These questions have heretofore been fully briefed by both parties and have all been resolved against the appellants in both of the courts above named.

As stated above, the appellants confine their brief in this Court to the one specification of error, and it is the appellees' point that the case as made by the brief of appellants in this Honorable Court does not present a Federal question, nor show the violation of any right of the appellants under the Constitution of the United States.

We submit this is true for the following reasons:

In the first place, the sole question raised by appellants' brief is whether the interest of appellants is realty and taxable in the county where the land is situated or personalty and taxable in the county of appellant's residence.

In the second place, the Federal question involved in this case, as stated by the appellants, is an alleged violation of the First Section of the Fourteenth Amendment of the Federal Constitution, and the particular complaint made is of an alleged denial to the appellants of the equal protection of the laws. (Record 7 and 8).

It is true that the record shows that the rate of taxation varied in the different counties of the State of Texas, but the record is entirely barren of any pleading or proof that all owners of royalty interest in Texas were not taxed on such royalty interest in the county where the property was situated, or that in this particular the appellants had been discriminated against.

Under this state of facts and under the record in this case, appellees urge that the question raised and argued in appellants' brief in this Court does not present a Federal question.

This question has often been before this Court. This is seen from the following quotation of the decision of this Honorable Court in the case of The Columbus Railway Company vs. William A. Wright, Comptroller General of the State of Georgia, 151 U. S. 470-479-482; 38 L. Ed. 238-243-244; 14 Sup. Ct. Rep. 396, where this Court says:

> "Without reviewing authorities on this subject, the principle involved in the case under consideration is not distinguishable from the principle involved in Taylor vs. Secor ("State R. Tax Cases") 92 U. S. 575 (23:663); and in Cincinnati, N. O. & T. P. R. Co. vs. Kentucky ("Kentucky R. Tax cases") 115 U. S. 321, 339 (29:414, 419); Minneapolis & St. L. R. Co. vs. Beckwith, 129 U. S. 26 (32:585); and in Charlotte, C. & A. R. Co. vs. Gibbes, 142 U. S. 386, (35:1051).
>
> "The whole complaint made by the plaintiff in error is that it had a constitutional right to have its rolling stock, and other unlocated personal property, taxed in the county of Muscogee, where it had its principal office, and to give such property a different situs, under the act complained of, by distributing it among the counties through which the road extended, was an unjust discrimination, and violated its constitutional rights. This proposition cannot be entertained for a moment, for the reason already stated, that is was clearly within the province of the legislature of Georgia to give such personal property a different situs, for purposes of taxation, from that of the company's principal office. The act in question having apportioned the transitory and unlocated property of the railroad company among the several counties through which the road extends for the purpose of taxation, and having subjected such

property to the same rate of taxation imposed upon all other property in the respective counties, the fact that the rate of taxation varied in the different counties, according to their respective wants and necessities, involved no discrimination against the railroad company. The state having the undoubted authority to fix the situs of such property, and having lawfully distributed it proportionately between the several counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or Federal Constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws."

This decision has recently been reaffirmed by this Court in the case of General American Tank Car Corporation, et al, appellants vs. Udora S. Day, Supreme Court Advance Opinions No. 9, dated March 15th, 1926, Page 239-240, 70 L. Ed._____, where it is said:

> "We are not concerned with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions. That is a matter within the competency of the state legislature. Columbus Southern R. Co. vs. Wright, 151 U. S. 470, 475, 476, 38 L. Ed. 238, 241, 242, 14 Sup. Ct. Rep. 396."

The appellees without further argument submit that the specification of error argued by appellants in their brief does not present a Federal question.

We desire also at the outset to call this Honorable Court's attention to the fact that the appellants in their

brief confuse the nature of the interest which is taxed and to restrain the enforcement of which tax this suit is brought.

We are certain that this confusion results from the improper use of the term "royalty." The word is generally misused. Royalty proper is accrued royalty, that is, the proportionate part of the oil after it has been produced and saved and set aside to the lessor. Accrued royalty is clearly personal property. But accrued royalty or the taxation of such is not involved in this case, there being no attempt on the part of the appellees to tax the accrued royalty to W. T. Waggoner or the Waggoner Estate. What is taxed is the right of the lessor to the oil which is under the ground and before it is actually severed and impounded and reduced to possession or, to speak more correctly, the value of the realty insofar as it is enhanced by the right of the owner of the realty to receive an equal one-eighth part of the oil when and after it is produced. Both the right to the oil after it is produced (the accrued royalty) and the right of the lessor to the oil which is under the ground is commonly, but incorrectly, termed "royalty interest." They are clearly separate and distinct and the nature of the property and the rights incident thereto are entirely separable.

This is clearly illustrated by the decision of the Commission of Appeals of Texas, Section A, in the case of Jones vs. O'Brien, 251 S. W. 208, which decision the appellants state on page 37 of their brief, has been adopted and entered as the judgment of the Supreme Court.

The decision of Commission of Appeals, Section A,

in the case just cited, as clearly demonstrated by the decision of the Court of Civil Appeals at El Paso in the same case, 274 S. W. 242, illustrates the distinction between royalty as accrued royalty and the royalty interest, which is the right of the owner of the land to the oil when it is produced coupled with the possibility of **reverter.** In the case of accrued royalty it is personalty and may be transferred by parol. The royalty interest, however, being a part of the land or in the nature of land cannot be transferred by parol but must be conveyed by deed in order to avoid being within the Statutes of Fraud.

We desire at this point to call the Court's attention to the fact that the appellant W. T. Waggoner in the transfer of his property to the W. T. Waggoner Estate, transferred the royalty interest by deed, (Record 144) and the accrued royalty as personal property, (Record 146) distinguishing the nature of the property in accordance with the decision of Jones vs. O'Brien above cited and referred to.

We make this preliminary statement, because from the plaintiffs' brief, it appears they confuse the nature of the royalty interest, which is sought to be taxed, using the term with the erroneous effect of conveying the idea, that the taxes levied against the appellants are levied on the accrued royalty.

On the merits and in answer to the points sought to be made by the appellants, the appellees urge the following:

COUNTER POINT NO. ONE

The leases involved in this case, evidencing a purpose not to give to the lessees therein ownership, dominion of, or the right to dispose of the one-eighth part of the oil required to be delivered to the lessor, transferred and conveyed to the lessees only seven-eighths of the oil in place, and such one-eighth of the minerals remaining in the lessor under the tax laws of the State of Texas are realty and taxable as such to the appellants.

COUNTER POINT NO. TWO

Even if it can be said that the leases here involved conveyed to the lessees the entire eight-eighths of the oil in place, nevertheless, the royalty interest, or the reservation of the right in the lessor to an equal one-eighth of the oil when produced, is a covenant or an incorporeal hereditament issuing out of the land and running with the land, and under the provisions of Article 7504, Revised Civil Statutes of Texas, taxable as real property.

ARGUMENT

Since this brief is wholly in the nature of a reply brief, we will discuss the questions raised by the appellants in the order presented by appellants.

In their argument under specification number one, the appellants first state that the Federal Courts in determining the legal effect of instruments in writing relating to property rights will ascertain and follow the con-

struction placed thereon by the highest courts of the State in which such property is located; and cite in support of this statement the decision of this Honorable Court in the case of Guffey vs. James A. Smith, 237 U. S. 101.

The appellees subscribe to this statement of the law and urge that the United States District Court for the Northern District of Texas, and the Circuit Court of Appeals for the Fifth Circuit have followed the construction placed by the Texas Courts upon the instruments in writing relating to property rights involved in this case. In the alternative, the appellees urge that if such is not the case, then it is because the questions involved here have not been decisively answered by the Courts of Texas. It may be said, therefore, that the appellees subscribe to the statement of the law made by the appellants with the further statement that where the decisions of the courts of the State have not definitely decided the specific question presented for the determination of this court, (especially in the light of whether the action of the taxing authorities of the State have violated the rights of a citizen under the Federal Constitution), then this Honorable Court is certainly free to determine the question and to apply its own rule of decision. Later we will refer to this point more specifically in our brief.

The appellants follow their statement of the law just referred to by devoting some four pages of their brief to a discussion of certain decisions of the Supreme Court of the State of Texas, which announce as a rule of law in force in Texas that minerals in place constitute

realty and are subject to severance from the remainder of the land by appropriate conveyances.

The cases cited by the appellants on this point are the cases of Stephens County vs. Mid-Kansas Oil and Gas Company, 113 Tex. 160, 254 S. W. 290, and Humphreys-Mexia Company vs. Gammon, 113 Tex. 247, 254 S. W. 296.

The appellants then cite the decision of the Supreme Court of Texas in the case of the Texas Company vs. Daugherty, 107 Tex. 226, 176 S. W. 717, which appellants state holds that under Article 7504 of the Revised Civil Statutes of Texas, 1911, minerals beneath the surface of the earth may be severed by an appropriate instrument in writing and when severed constitute realty for taxation purposes.

The appellees concede that the Supreme Court of Texas in the decisions above noted have held that minerals in place are a part of the land and may be severed and sold in place. The appellees concede that such minerals when severed by a proper conveyance constitute realty for taxation purposes.

The appellants, therefore, correctly state on page 26 of their brief that the appellees in this case do not take issue with either of the above two propositions of law.

It is the contention of the appellants, however, that the decision of the Supreme Court of Texas, in the case of Stephens County vs. Mid-Kansas Oil and Gas Company, cited supra, is not limited to the facts of that case or to the particular lease involved in that case, but that

the Supreme Court of Texas in such case announced a general rule of law covering, and intended to cover, every case where an oil and gas lease has been executed by a land owner in the State of Texas.

It is with this construction of the decisions relied upon by the appellants that the appellees differ. The appellants do not attempt to assert in their brief that there is not a real difference in the leases involved in the Stephens County case and the lease involved in this case. They could not well do so, because the difference is too apparent.

In the Stephens County case, the lessor granted his entire estate in the oil and gas underlying his land. The lessor did not except from this grant or reserve from this grant any right to a part of the oil produced therefrom. On the contrary and in consideration of the whole grant, the Mid-Kansas Oil and Gas Company obligated itself to deliver to the lessor a one-eighth part of all the oil produced or pay the market price in cash therefor **at the option of the lessee.** Thus in the Stephens County case all the essential elements of ownership vested in the lessee. The lessee upon receiving this lease was entitled to the right of possession and the right to dispose of all the oil and gas in and under the land in question. The lessee at its option could retain all the oil or sell it to other persons and discharge his entire obligation to his lessor by paying the lessor the market price therefor.

It is the contention of the appellants, however, in view of some general language used by the Supreme Court of Texas in its opinion that, notwithstanding the

particular and peculiar wordage of the lease involved in that case, the rule announced by the Supreme Court of Texas in that case applies to every lease regardless of any difference in the language used or exception made.

On the contrary, the appellees contend that the decision of the Supreme Court of this State in the Stephens County vs. Mid-Kansas Oil and Gas Company case should and must be limited to the facts of that particular case for the following reasons:

1. The Supreme Court clearly predicates its holding in the Stephens County case upon those essentials of ownership which the particular lease involved vested in the lessee.

2. A giving of the decision of the Supreme Court of Texas in the Stephens County case general application brings the decision of the Supreme Court in that case in conflict with later decisions of that Court, or of the decisions of the Commission of Appeals, which the Supreme Court of Texas expressly adopts.

We will hereafter show that the construction sought to be placed by the appellants upon the decision of the Supreme Court in the Stephens County case would have the Supreme Court of Texas in the Stephens County case announce a rule of property which is not consonant with later decisions involving the rights of the lessor or the assigns of the lessor.

We stated above that the Supreme Court in the Stephens County case clearly predicated its holding of that case upon those essentials of ownership, which the

particular lease thus vested in the lessee. Keeping in mind that the lease involved in that case did not except from the grant of the mineral estate a one-eighth of the part of the oil when produced nor reserved to the lessor a right to an equal one-eighth part of the identical oil produced, it is readily seen why the Supreme Court of Texas, in construing this lease, then said:

> "Ownership of the gas and oil in place meant having the exclusive right to possess, use and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use or dispose of the gas and oil in place in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use and dispose of such gas and oil in place passed to the grantees in said instruments and to their assigns."
>
> Stephens County vs. Mid-Kansas Oil & Gas Co., 254 S. W. 292.

The appellees thus submit that the Supreme Court of Texas itself clearly limits its decisions in the Stephens County case to the facts of that particular case and certainly the rule thus announced could not be applied to the case at bar where the leases involved in this case are essentially different.

The following is a copy of the lease which appellants assert is typical of all leases before the Court in this case:

> "The State of Texas,
> County of Wilbarger.
>
> "Agreement made and entered into this Febru-

ary 10th, 1922, by and between W. T. Waggoner, of Tarrant County, Texas, acting by R. L. More, his agent and attorney in fact, hereinafter called Lessor, and Texhoma Oil & Refining Company, of Wichita Falls, Texas, hereinafter called Lessee, witnesseth:

"That for and in consideration of the sum of One Dollar, cash in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the sum of $4,000.00 to be paid in oil produced from said premises, said payment to be made not later than the tenth day of each month, for the preceding month, and not less than one-fourth of the oil so produced to be applied on this indebtedness, and the covenants and agreements hereinafter set out to be kept and performed by the Lessee, have granted, demised, leased and let, and by these presents does demise, lease and let unto the Lessee, for the sole and only purpose of drilling and mining for gas and oil, the following lands, in Wichita County, Texas.

(Here follows detailed description of two tracts of land which aggregate 40 acres, more or less.)

"Lessee agrees and binds himself to pay an annual rental of One Dollar and Fifty Cents per acre, until actual drilling is begun hereon, and failure to pay said rental when due at the option of the Lessor shall void this lease.

"Subject to the terms and conditions herein this lease shall remain in full force and effect for a term of three years from date hereof, and as much longer as gas and oil are found and produced in paying quantities, provided, however, no one well shall hold more than ten acres, in a square form, said well being the center thereof.

"In consideration of the premises, the Lessee covenants and agrees:

"To deliver to the Lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced and (saved from) said premises, said settlement to be made not later than the tenth day of each month for the preceding month.

"That the Lessee will pay 7/8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises.

"That the Lessor shall have the refusal from time to time of all oil and gas, or either, produced hereon, at the posted price.

"When requested the Lessee will bury all pipe lines below plow depth.

"That the Lessee will use no water from the premises of said Lessor without the written consent of the Lessor.

"The Lessor agrees and binds himself to warrant and defend the title to the lands herein against all legal claims.

"This lease shall extend to the heirs and assigns of all parties herein, subject to the limitation herein.

"This instrument constitutes the entire contract between the parties hereto.

"Witness the day and date above written.

W. T. WAGGONER."

(Exhibit A, Record, p. 30).

Now does this lease give to the lessor the option to take all the oil and pay for the same in money as is done in the lease involved in the Stephens County case? Certainly not. On the contrary, the leases involved in this case except from the grant to the lessees an equal one-eighth part of the oil in place because they bind the lessee to produce and deliver to the appellants an equal one-eighth part of the identical oil produced from the premises. Does the right to possess, use and dispose of such oil and gas pass to the lessees in these instruments? Such could not be the case, because the lessee does not even have the privilege of substituting other oil of a like kind and value, but is bound under the clear provisions of the leases to deliver to the appellants the identical oil produced from the premises. Moreover, in this case, it is the lessor who has the option to take possesion of all the oil.

The holding of the Supreme Court of Texas in the Stephens County case, being predicated upon the right of the lessee to possess, use and dispose of the oil, limits the decision of the Court to that case and prevents the application of that decision to the case at bar.

Ownership implies something more than possession and control. In addition to these attributes, there must be the power to dispose of the property. Under the lease involved in this case, the lessee has no right to dispose of this one-eighth part of the oil. On the contrary, the lessor never at any time lost his right to dispose of this portion of his estate. At his death it would descend to his heirs. A mere deed to the land would convey it without specifically naming it. There is no escape from the

conclusion that this one-eighth was excepted from the operation of the grant and remained as much a part of the land as it was before the seven-eighths was severed.

There is small wonder then that Mr. Justice Atwell said, 298 Fed. 821):

> "There is no provision in the leases which have been offered in evidence which warrants us in finding that the lessor sold anything to the lessee except seven-eighths of the mineral. There is no right of alienation on the part of the lessee of the one-eighth royalty; the one-eighth continued to be, as it always was, the property of the lessor, and so long as it is "in place" it is a part of the realty."

Or that the Circuit Court of Appeals expresses the same decision in the following language:

> "No provision was made for the lessee becoming the owner of the part of the oil produced which was required to be delivered to the lessor. In this respect the instruments in question are materially different from the one which was under consideration in the case of Stephens County vs. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566."
>
> (3 Fed. 2nd Series 964.)

There is another and cogent reason why the decision of the Supreme Court of Texas in the case of Stephens County vs. Mid-Kansas Oil and Gas Company, cited supra, must be limited to the nature of the leases involved in that case. The decision must be so limited if it is to be harmonized with the later decisions of that Court.

This is true in the light of the decisions following the Stephens County case and notably the decision of the Commission of Appeals, Section B, in the case of Japhet vs. McRae, 276 S. W. 669; the decision of the Commission of Appeals having the express approval of the Supreme Court.

If the Supreme Court of Texas in the Stephens County case laid down as a general rule applicable to all leases, the proposition that the execution of a lease divests the lessor of all title to the minerals in place and vests in the lessee the entire eight-eighths of the minerals in place, then such decision is in conflict with the later decision of the Supreme Court in the case of Japhet vs. McRae, cited above. This is true for two reasons:

The first reason is that the Commission of Appeals in the case just cited specifically held that Japhet, the purchaser of ten acres belonging to the lessor, bought, by purchasing said land, **one-eighth of the oil in and under the land.**

The following quotation from that decision shows this clearly to be the case:

> "Our Supreme Court has held that oil is a part of the realty until brought to the surface, and that it can be sold in place. Japhet unquestionably bought the realty in the 10 acres. **He bought one-eighth of the oil in or under that land.** The lessee had the right to take full charge of the land so far as necessary to get the oil from under it. He had the title to the oil for that purpose. But, when it was brought to the surface, Japhet had the right to his one-eighth thereof. He had an equitable title to his

interest in that oil, **and if the lessee had made any effort to take it away from him, Japhet would have been entitled to sue him as for conversion of his property."** (Emphasis our.)

Japhet vs. McRae, 276 S. W. 671.

In the second place, the case of Japhet vs. McRae must be construed as limiting the effect of the decision of the Supreme Court of Texas in the Stephens County case, or else it is necessary to say that the later decision is fundamentally unsound.

The decision of the case of Japhet vs. McRae necessarily depended upon a consideration of the interest passed by an oil and gas lease. If, as contended by the appellants, the Supreme Court of this State holds that the entire eight-eighths of the oil and gas in place passes to the lessee by the execution of an ordinary oil and gas lease, then a later sale by the lessor of a portion of the land upon which a lease had been executed could not vest in the transferee a one-eighth of the oil in or under the particular acreage sold.

The lease involved in the Japhet vs. McRae case, like the lease involved in this case, excepted the one-eighth of the oil which the lessee is required to deliver to the lessor in specie. If this is not an exception from the grant, then the transferee would obtain no title to any part of the oil in and under any particular portion of the land. He would share the royalty with all other transferees on the apportionment theory which is based upon the assumption that all of the oil in place is transferred by the execution of the lease to the lessee, there

being reserved to the lessor a right or a new estate. But the Supreme Court of Texas by its approval of the opinion of the Commission of Appeals in the case of Japhet vs. McRae, expressly repudiates the apportionment rule and holds that title to one-eighth of the oil in and under the specific acreage transferred vested in and passed to the transferee.

It is submitted that the holding of the Supreme Court of Texas in the Stephens County case is limited to that case, and that case is clearly distinguishable from the case at bar, and that in the case at bar the leases clearly excepted from the grant the one-eighth of the minerals in and under the land.

But the appellants, commencing on page 28 of their brief and continuing through page 35, say, that construed in the light of Texas law governing the construction of instruments or deeds, the exception is repugnant to the granting clause of the leases, and therefore, must be disregarded.

The appellants cite a number of Texas authorities holding that the granting clause of a deed, in case of conflict, prevails over other clauses. We have no fault to find with the rule announced or with the authorities cited by the appellants. It is our contention, however, that neither this rule nor the authorities cited have any application to the case at bar.

In the first place as said by Justice Phillips, speaking for the Supreme Court of Texas, in the case of the Texas Company vs. Daugherty, et al, 107 Tex. 226, 176

S. W. 717-719, these leases should be looked at from their "four corners."

The rule of construction to be applied is clearly announced in the very recent case of Associated Oil Company, et al vs. Hart, 277 S. W. 1043-1044, decided by the Commission of Appeals, Section B, with the express approval of the Supreme Court of Texas on the question discussed.

In the case just cited, the Court says:

> "In construing a deed, like any other written instrument, the primary and all-important consideration is the intention of the parties as gathered from the instrument. Cravens vs. White, 73 Tex. 577, 11 S. W. 543, 15 Am. St. Rep. 803. No extended citation of authorities is needed to a proposition so elementary. Even where different parts of the instrument appear to be uncertain, ambiguous, or contradictory, yet if possible, the court will harmonize the parts and construe the instrument in such a way that all parts may stand, and will never strike down any portion except there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part. The strictness of the ancient rule as to repugnancy in deeds is now much relaxed, and the saner method is applied of permitting all parts of the instrument to stand where possible and to gather the intention of the parties from the whole instrument. See authorities cited in 18 Corpus Juris, p. 267, Sections 224 and 225. Generally, of course, the parties to an instrument intend every clause in such instrument to have some effect and in some measure to evidence their agreement, and this purpose should not be thwarted except in the plainest case of necessary repugnance. In truth, a reserva-

tion or exception which is repugnant to the grant is stricken from the instrument for the sole purpose of giving effect to the evident intention of the parties to the instrument. It is an artifice or arbitrary device adopted by the courts to accomplish the wholesome purpose of giving effect to the intention of the parties as gathered from the instrument as a whole. The rule permitting this arbitrary rejection of part of an instrument does not prevail however, where there is room for construction through reconcilement of the parts. Bearing in mind that reservations and exceptions out of the thing granted are clearly allowed, it is necessarily true, as pointed out in Cravens vs. White, in the nature of things "there is more or less repugnancy in the provisions of all deeds in which a part of the thing embraced in the general description is excepted from the operation of the instrument." This statement is not absolutely accurate when technically tested, but is abundantly true according to the common understanding. Of course, in law there is no repugnancy if the reservation or exception is explicable without destroying the grant in whole or in part. It merely presents a proper case for construction. Obviously, any disregard of any portion of the deed does violence to the act of the parties in employing such language and will never be resorted to arbitrarily. See Benskin vs. Barksdale, (Tex. Com. App.) 246 S. W. 360, and authorities there cited."

Associated Oil Company, et al vs. Hart, 277 S. W. 1044.

It is thus seen that in Texas, the strictness of the ancient rule as to repugnancy in deeds is now relaxed and the intention of the parties is gathered from the whole instrument.

The case cited in Justice Spear's opinion, to-wit, the case of Koeningheim vs. Miles, 67 Tex. 113, aptly illustrates that in realty there is no repugnancy in the lease involved in this case.

The illustration given by Justice Gaines, in the case last cited, demonstrates the difference existing where there may be said to be a repugnancy and where it is said there is no repugnancy.

The first illustration is as follows: "A grant of Block 5," in a certain town, except Lot 1. In such a case, Justice Gaines says there is no repugnancy; not because lot 1 is not included in the grant of Block 5, but because thus expressed there is evidence of intention to convey Block 5 less Lot 1.

The second illustration is a grant of Lots 1, 2, 3 and 4 in Block 5, except Lot 1. In such a case, Justice Gaines says the exception will not stand, because there is a necessary contradiction of the grant.

The case at bar falls within the first illustration. The granting clause in this case is a general one, to-wit, "have granted, demised, leased and let, and by these presents does demise, lease and let unto the lessee for the sole and only purpose of drilling and mining for gas and oil on the following lands in Wichita County, Texas." There is excepted from this grant the equal one-eighth part of the identical oil and gas produced as is seen from the following: "To deliver to the lessor, free of charge, in the pipe lines to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced and (saved from) said premises, said settlement to be made

not later than the tenth day of each month for the preceding month."

Thus there is evidenced the intention to convey the minerals **less** the equal one-eighth part. In order for the exception to be repugnant in the light of the decisions above noted, it would be necessary for the granting clause to have specifically stated that there was granted to the lessees the entire eight-eighths of the oil and gas or minerals under said land. In such a case, of course, the exception of one-eighth could not have stood, because of the necessary contradiction of the grant. But as stated the leases involved here contain only a general granting clause and as further illustrating the intention of the parties, arrived at from the "four corners" of the lease, **it is to be noted that the parties expressly agreed with reference to taxation that seven-eighths of all increase in taxes by virtue of the grant should be assessed against the lessee.** This to our minds further clearly evidences the intention of the parties to convey to the lessees the mineral less an equal one-eighth.

The appellees thus earnestly submit that a correct application of the rules in force in Texas concerning the construction of deeds conclusively establishes in the leases involved in this case the exception from the grant of the mineral estate of the equal one-eighth part thereof, and an application of these rules further distinguishes the case at bar from the decision of the Supreme Court of Texas in the Stephens County case.

This brings us to a consideration of appellees' counter point number two, and to a reply to that portion of appel-

lants' brief, wherein they urge that in any event the royalty is personal property because the right to the royalty is analogous to the right of the vendor to payment of the purchase price secured by a vendor's lien, and therefore, a mere credit.

The argument made by the appellants commences on page 43 of their brief and continues to the close thereof on page 52. The vice of this portion of appellants' brief is two-fold.

In the first place, appellants ignore the distinction made by the Commission of Appeals, Section B, in the case of Jones vs. O'Brien, 251 S. W. 208, between accrued royalty (which is not sought to be taxed by Wichita County), and the royalty interest of the appellants (which is sought to be taxed by Wichita County).

In the second place, appellants assume that if it be said that the instruments of conveyance involved in this case passed to the lessees the entire mineral realty, then it necessarily follows that the royalty interest or the right of the lessor to an equal one-eighth of the oil plus the possibility of reverter is a mere credit and taxable as personal property.

The appellants state on page 42 of their brief that the Texas Courts hold that royalty is personal property. This is true only insofar as by the term royalty is meant accrued royalty.

An analysis of the decision of the Commission of Appeals in the case of Jones vs. O'Brien, cited supra, clearly shows that the court in construing "royalty" as personalty property meant only accrued royalty.

The statements made by the Commission of Appeals in the case of Jones vs. O'Brien, supra, must be taken as applying only to the situation existing in that case. A general demurrer had been sustained by the trial court to the plaintiff's petition. Under the rule that as against a general demurrer every reasonable intendment must be indulged in in favor of the petition, the Commission of Appeals held, that the contract purporting to convey "royalty," it might be inferred that the parties intended to contract with reference to "accrued royalty," that is, with reference to that part of the oil which had been separated from the soil and placed in pipe lines, in which event the contract would relate to personalty.

The direct question involved in the case was whether or not the contract was within the Statute of Frauds; that is, a contract relating to the sale or transfer of real estate and required by the Statute of Frauds to be in writing. The case was reversed so that proof might be made as to the real intention of the parties.

We deem it a complete answer to the statements made by appellants, on page 42, that royalty is personal property, to quote from the Court's opinion rendered in the Jones vs. O'Brien case, cited above, as follows:

> "Viewing it in all its parts and looking to the multitudinous references to the subject of the contract between O'Brien and Jones as 'said royalty' or 'his said interest in said royalty,' we think the petition is very reasonably susceptible of the construction that defendant in error intended to allege that the only subject of the contract between him and Jones was the interest in the one-eighth royalty, as

commonly understood; **that is, an interest in the oil after being separated from the soil and placed in pipe lines or other depositories, or an interest in the money value thereof."** (Emphasis ours).

A tracing out of the final determination of this case conclusively shows the real holding of the Commission of Appeals to be that the accrued royalty was personalty and could be validly transferred and sold by parol, but the royalty interest, that is, the right of the lessor to the oil and gas before severance coupled with the possibility of reverter, was a part of the land and could not be transferred by parol. After the decision of the Commission of Appeals, Section A, of this case, reported in 251 S. W. 208, the case was retried. Upon the last trial, the case was submitted to the jury on special issues, wherein the jury was asked to find whether or not the agreement was to purchase the royalty interest or whether it was to purchase only the accrued royalty. The jury in response to these issues found the agreement of purchase to be the entire royalty interest and not of the accrued royalty. Upon these findings of the jury, it being conceded that the contract between O'Brien and Jones was verbal, the trial court entered judgment in favor of the defendants; necessarily holding that the agreement of purchase was of an interest in land and being by parol was within the Statute of Frauds.

This judgment was affirmed by the Court of Civil Appeals at El Paso, the report being found in 274 S. W. page 242. The application for writ of error to the Supreme Court of Texas was dismissed for want of jurisdic-

tion. (See Advance Sheet, dated April 14th, 1926, No. 3, Vol. 280, Southwestern Reporter, Page XV.)

It may be safely asserted, therefore, that the Supreme Court of Texas in the case just referred to has announced the exact contrary of the rule asserted by the appellants and holds that the royalty interest, (which is sought to be taxed here) is real property. Being realty, then clearly, under the provisions of the Constitution of Texas, Article 8, Section 11, and Article 7504 of the Revised Civil Statutes of Texas, 1911, this royalty interest is taxable as realty and in the county where it is situated.

The decision in the case just cited, we think clearly differentiates the royalty interest from the interest a vendor of land has in property which he has sold and shows that the case of Liberto, et al vs. Sanders, et al, 248 S. W. 120, has no application to the case at bar.

The decision of the Commission of Appeals in the case of Jones vs. O'Brien, cited supra, is in line with the weight of authority. Leases similar to the ones involved here are generally so construed.

It is, of course, the primary contention of the appellees in this case that only seven-eighths of the minerals, in and under the lands, passed to the lessees and that one-eighth of such minerals were excepted from the grant. If the appellees are wrong in this, however, and the royalty interest is in the nature of a reservation and not an exception from the grant as those terms are usually defined in law, nevertheless since the royalty interest is a right concerning the land and annexed to the land, it is a part of the land and under the provisions of

Article 7504, Revised Civil Statutes of Texas, 1911, taxable as land.

If this royalty interest is not an exception, it is clearly a reservation. If an equal one-eighth interest in the oil and gas in place was not excepted from the grant then the right of the lessor to be paid an equal one-eighth part of the oil when brought to the surface is a reservation of some new thing to the lessor issuing out of the thing granted, and is, therefore, a reservation. (See definitions of that term contained in Words and Phrases, 2nd Series, Vol 4, Pages 328 and 329.)

Viewing the royalty interest as a reservation, it may very properly be referred to as an incorporeal hereditament, which is thus defined: "A right issuing out of the thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same." Bouveir's Law Dictionary, Valume 2, Page 1528.

Now since this right is concerning land, is annexed to and exercisable as a part of the land, then within the meaning of Article 7504 of the Revised Civil Statutes, it is taxable as land. This for the reason that Article 7504 provides:

> "Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements or other fixtures of whatsoever kind thereon, **and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same.**"

Now clearly this royalty interest is a right and privilege belonging or appertaining to the land. It is an incident to and follows the land until severed therefrom by the owner. Unless reserved by the owner the royalty interest will pass with a sale or devise of the land.

This is the necessary effect of the decision of the Commission of Appeals, Section B, in the case of Japhet vs. McRae, 276 S. W. 669.

In the case just cited, one Fisher and wife had executed an oil, gas and mineral lease to the Producers Oil Company on a certain 15 acre tract of land. Subsequently, Fisher, the original lessor, conveyed to one Walter Keeble, the North 5 acres of the 15 acres. Keeble then conveyed to McRae, the defendant in error, an undivided 3 acres out of the North 5 acres. Some months later, Fisher, the original lessor, sold to Keeble the remaining South 10 acres of the 15 acre tract, and on the same day Keeble conveyed the 10 acre tract to the plaintiff in error, Japhet. The various deeds conveying these lands were in the usual forms of general warranty deeds, all referring to the lease of the Producers Oil Company but making no provision as to the royalty interest.

The Commission of Appeals in holding that Japhet was entitled to the full one-eighth of all oil produced from the ten acres thus purchased by him, necessarily holds that the execution of a deed to the land carries with it the right to the royalty interest or to the oil in and under that land.

The Statute of Frauds with reference to the sale of real estate is applicable if there is to be a sale of the royalty interest.

Jones vs. O'Brien, cited supra;

United States vs. Noble, 237 U. S. 74, 35 Supreme Court Reporter 532, 59 L. Ed. 845.

In the Noble case, cited supra, this Honorable Court, speaking through Mr. Justice Hughes, had this to say:

> "The rents and royalties were profits issuing out of the land. When they accrued they became personal property; **but rents and royalties to accrue were a part of the estate remaining in the lessor."** (Emphasis ours.)

It goes without saying that the royalty interest under leases similar to those in question is a valuable interest. It is the subject of ownership. Under laws pertaining to taxation it is unquestionably property and subject to taxation.

This Honorable Court in the case of Dowman vs. the State of Texas, 231 U. S. 353, 58 L. Ed. 264, speaking through Mr. Justice Lamar, on the rights of the Federal Courts to enjoin the assessment of taxes pertaining to mineral rights of property located in the State of Texas, used the following language, which in our opinion, is very applicable to the case at bar:

> "If the mineral actually added to the value, the law required that it should be represented in the assessment of the land. Usually real estate is taxed as a unit; but as different elements of the land are capable of being severed and separately owned, the statute may authorize a separate assessment against the owners of the severed parts. Accordingly, if the title has been severed, land may be taxed to one, timber to another, or land to one and coal to another.

> The state court held that such was the law of Texas, in view of the general language of the statute defining real estate as including not only the land itself, but the buildings on the land and the minerals under the land."

But the appellants say that the royalty interest is a "credit" as that term is defined by Article 7506 of the Revised Civil Statutes of Texas, 1911, and as supporting their argument rely largely on the decision of the Supreme Court of Minnesota in the case of State vs. Rand, 40 N. W. 835.

The facts as stated by the appellants relate to an attempt on the part of the State of Minnesota to tax the consideration which the corporation agreed to pay under the contract of purchase.

In the first place to be analogous on the facts to the case at bar, the case at bar would have to be an attempt on the part of Wichita County to tax the accrued royalty or the value of the oil after produced.

It is clearly seen furthermore that the case relied upon by appellants is a case involving a credit proper. It has nothing to do with the royalty interest of the lessor in an oil and gas lease. In fact, the Supreme Court of Minnesota when confronted with the precise question of whether or not the royalty interest is a credit and taxable as personal property expressly holds to the contrary and expressly holds that it is a part of the land and taxable as realty.

The decision of the Supreme Court of Minnesota on this question is pertinent and of interest for the reason

that appellants state that the statutory law of taxation in Minnesota is practically the same as the statutory law of taxation in Texas, and defines credits practically in the identical language as used by the Statutes of Texas.

The decision of the Supreme Court of Minnesota, which we refer to, is found in the case of State vs. Royalty Mineral Association, 156 N. W. 128-130. In this case the Supreme Court of Minnesota, while treating royalties in the nature of unaccrued rents, enunciates the correct rule. The Court says:

> "The definition of credits is broad, but credits are personal property and so regarded throughout our statutes. It appears clear that there was no purpose to break down the lines between real and personal property, or to bring within the provisions for assessment of personal property any property. which was in its essential nature realty, and that the term "credits," as used in the taxing statutes, embraces only choses in action which are in their nature personal property. It follows that these rents are not taxable as "credits."
>
> "These views are in accord with the practical construction which these statutes have always received. The taxation of credits is now new. The definition of the term is now new. The same definition has obtained since 1878, G. S. 1878, ch. 11, Sec. 4. Never have rents or royalties to accrue on mining leases been taxed as "credits." Never has any other class of rents been taxed as "credits."
>
> "Nor is there any reason or logic in taxing only the rents to accrue during the current year. If rents unaccrued, but to accrue during the remainder of the current year, are taxable as "credits," then

> all rents to accrue during the whole period of the lease are so taxable for they are equally "sums of money receivable at stated periods—to become due." If unaccrued rents are "credits" then when credits were taxed at their full value, as they were under Rev. Laws 1905, Sec. 810, the tax on unaccrued rents on long leases would have largely consumed the annual rent, and this notwithstanding the fact that the land had once been taxed as other land."

It is submitted that the decision of the Commission of Appeals in the case of Jones vs. O'Brien, 251 S. W. 208, in definitely deciding that the royalty interest is not personalty, likewise decided that the royalty interest is not a mere credit.

It is further submitted that the necessary effect of the decision of the Commission of Appeals in the case of Japhet vs. McRae is that the royalty interest is not a mere credit or personalty but is a part of the land and taxable as realty.

The decisions of the Courts of this State on this point, we submit, is in line with the decision of this Honorable Court in the case of United States vs. Noble, 237 U. S. 74, 35 Supreme Court Reporter 532, 59 L. Ed. 845, where it is held "but rents and royalties to accrue were a part of the estate remaining in the lessor."

To hold the royalty interest of the lessor, an incorporeal hereditament and annexed to the land and not a mere credit is in line with the decision of this Honorable Court in the case of Louisville and Jeffersonville Ferry Co. vs. Commonwealth of Kentucky, 188 U. S. 385, 398; 47 L. Ed. 513, 519. This Court in the case just cited holds

that the franchise of a ferry company is an incorporeal hereditament. Certainly if the franchise of a ferry company is an incorporeal hereditament and taxable as such, then the royalty interest of lessor is not a mere credit and taxable as personalty.

At the beginning of their argument, the appellants say that the Federal Court should follow the construction placed on legal instruments by the highest courts of the state in which the property is located. As heretofore stated, we subscribe fully to this statement.

We think it equally well settled, however, that where the courts of the state have not passed upon the specific question involved, then the Federal Court is free to follow its own construction. This is peculiarly so in this case before this Honorable Court, where it is asserted that the constitutional rights of citizens have been violated.

The appellees say that the Courts of this State in the case of Jones vs. O'Brien, cited supra, and in the case of Japhet vs. McRae, cited supra, have decided the question involved here in their favor. It is urged that if this is not true, then the decisions of this State are in hopeless conflict and it may be said that the question of what is a royalty interest is, in Texas, in a condition of indecision.

Under such circumstances, if they exist, then we urge that this Court follow the rule previously announced by it in the case of United States vs. Noble, cited supra, which is in line with the general rule holding that royalty interests are incorporeal hereditaments and being an incident to and annexed to the land are a part of the land and taxable as realty.

CONCLUSION

We respectfully submit that the assessment made by Wichita County against appellants for 1923 taxes do not violate the requirements of law calling for a uniform and equal assessment nor are asserted in violation of the Texas Constitution or of any rights of the appellants under the Constitution of the United States.

We respectfully urge that the decree of the United States District Court for the Northern District of Texas, Wichita Falls Division, and the decision of the Circuit Court of Appeals for the Fifth Circuit be, in all things, affirmed.

Respectfully submitted,

T. R. BOONE,
E. W. NAPIER,
E. L. FULTON,
E. T. DUFF,
JOHN B. KING,
Attorneys for Appellees,
Wichita Falls, Texas

BULLINGTON, BOONE, HUMPHREY & KING,
Wichita Falls, Texas
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 52.—October Term, 1926.

W. T. Waggoner Estate and W. T. Waggoner, Appellants, *vs.* Wichita County and D. B. Sartin, H. H. Haynes et al.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Appellants Waggoner, a citizen of Tarrant County, Texas, and the Waggoner Estate, domiciled in Texas, brought suit in the district court for northern Texas against Wichita County, the members of the Board of Equalization, and the Tax Collector of the county to enjoin the collection of a tax stated to be illegally assessed. The bill alleged that the tax contested as illegal exceeded the jurisdictional amount; that Waggoner at the time of the assessment, January 1, 1923, was the owner of 12,000 acres of oil producing land located in Wichita County; that the land which was transferred after the assessment to appellant, the Waggoner Estate, was subject to certain oil leases under which Waggoner, as lessor, was entitled to receive as royalties one-eighth of all the oil produced; that the Board of Equalization in computing the tax upon the lessor's interest in the oil under his leases, determined that the royalty in the daily production of oil from the leased land, estimated as of January 1, 1923, would be 723 barrels per day and that the total value of such oil was $1,000 per barrel of daily production thus estimated or $723,000. The bill assailed the tax assessed as illegal and in violation of the due process and equal protection clauses of the Fourteenth Amendment, in that appellant's interest in the oil leases up to $718,300 of the assessed value had been erroneously treated for taxing purposes as real estate in Wichita County, instead of personal property taxable in Tarrant County where the lessor resided; that in valuing this interest appellees had in-

tentionally and systematically applied a higher rate than upon similar property in the county, thus denying appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

The judgment of the district court dismissing the bill after a trial, 298 Fed. 818, was affirmed on appeal by the Court of Appeals for the Fifth Circuit. 3 Fed. (2d) 962. Both courts held that the interest taxed was realty and hence subject to tax in Wichita County where the leased lands were situated. They held also that the assessment was not discriminatory and did not violate the provisions of the Fourteenth Amendment. Although the tax was assessed on appellant at the rate of $1,000 per barrel on the estimated daily production and the interests of the several lessees in the oil under the various leases were valued at $450 per barrel, it was held that there was substantial basis for the difference in the rate since the entire expense and risk incident to production were borne by the lessees.

The case comes here on appeal allowed by the Circuit Court of Appeals. The jurisdiction of the district court was invoked on the sole ground that substantial constitutional questions were involved. Hence, a direct appeal should have been taken from the district court to this Court. Jud. Code, § 238 before amended. *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73; *Carolina Glass Co.* v. *Murray*, 240 U. S. 305, 318; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 52. Having been erroneously brought to the Circuit Court of Appeals, the case should have been transferred to this Court. Jud. Code, § 238(a), before the amendment of February 13, 1925. But as the appeal to the Circuit Court of Appeals was allowed within three months after the entry of judgment in the district court, the present appeal will operate effectively to lodge the case in this Court for its decision without the needless ceremony of remanding the case to the Circuit Court of Appeals to enable that court to transfer it back to us for a second consideration. *Wagner Co.* v. *Lyndon*, 262 U. S. 226; cf. *McMillan Co.* v. *Abernathy*, 263 U. S. 438. Treating this as a direct appeal from the district court in a case where the sole ground of its jurisdiction was the construction or application of the Constitution of the United States, we may limit our decision to either federal or state questions which dispose of the case. *Davis* v. *Wallace*, 257 U. S. 478, 482; *Risty* v. *Chicago, R. I. & Pac. Ry.*, 270 U. S. 378, 387.

That there was a basis for discrimination in valuing the lessor's and lessees' interests in the oil is not questioned here. But appellants insist that it was erroneous to tax the lessor's interest as realty in Wichita County instead of personalty taxable in Tarrant County, the residence of the taxpayer. As they rely on the allegation in the bill that the board intentionally and systematically exempted from taxation other personal property in Wichita County, it is implicit in this contention that the taxing authorities, by treating these interests as realty instead of personalty, denied them the equal protection of the laws. But we find it unnecessary to deal with the constitutional aspect of the question as we conclude that the interest was properly taxable as realty.

Whether realty or personalty is a question of local law upon which the local decisions and statutes control. *Edward Hines, Trustees* v. *Martin*, 268 U. S. 458, 462. Under Art. 7510, Complete Tex. Stat. 1920, all real estate is taxable in the county where located.

It is the contention of appellants that by the law of Texas, minerals, including oil in place in the soil may by appropriate deed or conveyance be severed from the remainder of the land and granted in full ownership; that Waggoner by the several leases of the lands in question conveyed the entire interest in the oil to the lessees; hence the royalty provisions in the leases are at most contractual obligations of the lessees to deliver to the lessor a part of the oil when removed from the earth; and that such contractual rights are personalty, taxable in the county of the domicile of the obligee.

Assuming, as appellants contend, that mineral rights may be thus severed and conveyed, *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160; *Texas Co.* v. *Daugherty*, 107 Tex. 227, the question remains whether the present leases purport to convey to the lessees all rights in the oil in the leased lands, or whether they reserve in the lessor an undivided one-eighth share. All the leases are in substantially the same form. They recite that in consideration of a money payment and the lessees' covenants, the lessor leases the described lands "for the sole and only purpose of drilling and mining for gas and oil." The lessees covenant:

"To deliver to the Lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (1/8) part of all the oil and gas produced on said premises, settlement to be

made not later than the tenth day of each month for the preceding month.

"That the Lessee will pay 7/8 of all increase in taxes, by virtue of gas and oil, or either, that may be assessed against said premises."

It is to be noted that the leases contain no words of grant of the minerals as such, but the lands are demised solely for the purpose of drilling and mining. The lessees are in terms given neither title, right of appropriation nor power of disposition of the share of the oil which is to be delivered to the lessor when severed from the soil. The covenant of the lessees to pay 7/8 of all increase in tax "by virtue of gas and oil" is inconsistent with the contention that the lessor retained no interest in the minerals in place in the soil.

In the absence of controlling authority in the Texas courts, we can find in the terms of the leases themselves no basis for the contention that the lessor granted or conveyed away his entire interest in the oil. The case of *Stephens County* v. *Mid-Kansas Oil & Gas Co., supra,* is relied upon by appellants, but in that case the lease, in other respects similar to those now under consideration, provided that the lessee at his option should pay the stipulated royalties in oil or cash. It thus conferred on the lessee the essentials of ownership: possession, with unrestricted power of appropriation and disposition of the oil. The lessee was therefore properly taxed as owner. The considerations which led to that result lead to the conclusion here that the ownership of the royalty oil remained in the lessor who retained the power of disposition and the right to receive possession, and that his interest was properly taxed as realty.

This conclusion is supported by the decision of the Texas courts in *Japhet* v. *McRae,* 276 S. W. 669, indicating that the lessor's right to an oil lease royalty, although not specifically mentioned, is embraced in a conveyance of the land by the lessor, so that upon the subdivision of the land, the respective grantees acquire the right to the royalty in all oil produced on the granted land. Compare the decision of the Texas courts in *Jones* v. *O'Brien,* 251 S. W. 208; *O'Brien* v. *Jones,* 274 S. W. 242, for the application of the statute of frauds to sales of the lessor's interest in leased lands. See also *United States* v. *Noble,* 237 U. S. 74, 80; *Barnsdall* v. *Bradford Gas Co.,* 225 Pa. St. 338, 343.

Judgment affirmed.